Mr Justice Clifford

SUPREME COURT OF THE UNITED STATES.

No. ~~174~~. 96.

EDMUND RICE, PLAINTIFF IN ERROR,

vs.

THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

G. S. GIDEON, Printer, 514 Ninth street, Washington.

1019

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GIDEON, Print.

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Supreme Court of the United States.

EDMUND RICE, Pl'ff in Error,
against
THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY, Def'ts in Error.
} Precipe for Writ of Error.

Now comes the above named pl'ff in error by J. V. D. Heard, his attorney, and demands a writ of error from this court to the district court of the United States for the State of Minnesota, in the above entitled action, as by law allowed.

J. V. D. HEARD,
Att'y for Pl'ff in Error.

Aug. 1, 1859.
Filed Aug. 1, 1859.

GEO. W. PRESCOTT, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the Judge of the District Court of the United States for the district of Minnesota, greeting:

[SEAL.]

Because in the records and proceedings, as also in the rendition of a judgment in a plea which is in the said district court of the United States for the district of Minnesota, before you, between Edmund Rice, plaintiff in error, and the Minnesota and Northwestern Railroad Company, defendant in error, a manifest error hath happened, to the great damage of the said Edmund Rice, plaintiff in error, as by the complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties in this behalf, you are therefore hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court of the United States, this first day of August, in the year of our Lord one thousand eight hundred and fifty-nine, and of our independence the eighty-fourth.

GEO. W. PRESCOTT,
Clerk of the U. S. Dist. Court for Minnesota.

[REC. CLXXIV, D. T., 1860.]—1

To the Honorable Justices of the Supreme Court of the United States of America:

The return to this writ appears by the schedule hereto annexed.

The answer of the justice of the district court of the United States within mentioned.

Attest: GEO. W. PRESCOTT, *Clerk.*

Clerk's Office of the District Court of the United States for the district of Minnesota, ss.

[SEAL.]

I, Geo. W. Prescott, clerk of the said district court, do hereby certify that I have carefully compared the following with the original clerk's certificate, summons, complaint, answer, reply, demurrer to reply, order overruling demurrer, judgment upon demurrer, notice of appeal to the supreme court of Minnesota Territory, undertaking upon said appeal, points of plaintiff, points of defendants, order of the supreme court of said Territory reversing judgment below, and judgment of said supreme court upon said order, together with the full record of proceedings in said cause had in the said district court of the United States for said district of Minnesota—the same being the successor of the said Territorial supreme court—as the same are on file and of record in my said office, and that they, the following, are full and complete and perfect copies of said originals.

I further certify that, pursuant to act of Congress in such case made and provided, said cause of Edmund Rice, respondent, vs. The Minnesota and Northwestern Railroad Company, appellants, was duly transferred, upon the organization of the State government of Minnesota, from the supreme court of said Territory of Minnesota to the said district court of the United States for the district of Minnesota, and that the original files and papers in said cause are, by said transfer, now in and become the files and records of this court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, this 1st day of August, A. D. 1859.

GEO. W. PRESCOTT, *Clerk.*

District Court, third Judicial District for said county and Territory.

TERRITORY OF MINNESOTA,
County of Dakota.

EDMUND RICE
against.
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

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I hereby certify the within to be a true copy of the judgment roll in the above cause.
Dated Mendota, Jan. 12, 1857.

R. J. IRWIN, *Clerk.*
By J. J. NOAH, *Deputy.*

District Court, Dakota county, 3d dist.

EDMUND RICE
against
THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY. } Summons.

To the Defendant above named:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office in St. Paul, in said Territory, within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court to have his damages assessed by a jury, or the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so assessed or ascertained.

J. V. D. HEARD, *Plaintiff's Attorney.*

Dated Nov. 1st, 1856.

Territory of Minnesota, District Court for 3d district, Dakota county.

EDMUND RICE
vs.
THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY.

The complaint of Edmund Rice, the above named plaintiff, respectfully shows to this court, that the above named defendants, the Minnesota and Northwestern Railroad Company, are a body corporate, incorporated by, under, and by virtue of an act passed by the legislature of the Territory of Minnesota, and capable in law of being sued and impleaded in this action; that said defendants, on the 25th day of October, in the year A. D. 1856, with force and arms, broke and entered a certain close of the plaintiffs, being the tract or parcel of land known as the southwest quarter of the southeast quarter of section No. fifteen, (15,) in town No. one hundred and fourteen north of range No. nineteen west, situate and being in the county of Dakota and Territory of Minnesota aforesaid, and then and there felled, cut down, prostrated, and killed trees, to wit, five hundred oaks and five hundred other trees, upon the said tract or parcel of land, and within the said close then growing and being, and took and carried away the same,

and other wrongs then and there did, to the damage of the plaintiff of one thousand dollars.

And said plaintiff further complaining, shows that heretofore, to wit, on the day and year aforesaid, and in the county aforesaid, the said defendants, with force and arms, broke and entered a certain other close of the plaintiffs, being the tract or parcel of land known as the east half of the northeast quarter and the northwest quarter of the northeast quarter of section No. twenty-two, (22,) in township No. one hundred and fourteen (114) north of range No. nineteen (19) west, and then and there felled, cut down, prostrated, and killed the trees, to wit, five hundred oaks and five hundred other trees, upon the said tract or parcel of land, and within the said close then growing and being, and took and carried away the same, and other wrongs then and there did, to the damage of the plaintiff of twelve hundred dollars.

Wherefore the plaintiff demands that the defendants may be adjudged to pay the plaintiff damages to the sum of two thousand two hundred dollars, with the costs of this action.

J. V. D. HEARD, *Attorney for Pl'ff.*

Nov. 1st, 1856.

A true copy. Compared by me, Jan. 12, 1857.

R. A. IRWIN, *Cl'k.*
By J. J. NOAH, *Dep'ty.*

Territory of Minnesota, District Court for 3d judicial district, Dakota county.

EDMUND RICE
vs.
THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY. } Answer.

The answer to the above named defendants to the complaint of the plaintiff in this action, respectfully shows to this court:

That before the commission of the acts complained of in said complaint, or either of them, to wit, on the fourth day of March, in the year of our Lord one thousand eight hundred and fifty-four, an act was passed by the legislature of the Territory of Minnesota, and approved by the governor thereof, in the words and figures following, that is to say:

An Act to incorporate the Minnesota and Northwestern Railroad Company.

Section 1. Be it enacted by the legislative assembly of the Territory of Minnesota, That Robert Schuyler, William P. Burrall, George L. Schuyler, Morris Ketchum, Edward Bement, R. B. Mason, and George W. Billings, of the city of New York; Erastus Corning, of the city of Albany; John M. Forbes, Curtis B. Raymond, and John Gardner, of the city of Boston; W. B. S. Moore, of the city of Bangor, Maine; and Frederick S. Jessup, of the city

of Dubuque, Iowa; and Franklin Steele, Charles W. Borup, Orange Walker, Alexander Wilkin, Willis A. Gorman, Alexander Ramsey, James Stimson, J. Travis Rosser, of the Territory of Minnesota, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate, by the name and style of the "Minnesota and Northwestern Railroad Company," and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places whatsoever, in like manner and as fully as natural persons: may make and use a common seal, and alter and renew the same at pleasure; and by their said corporate name and style shall be capable in law of contracting and being contracted with; shall be, and are hereby, invested with all the powers, privileges, immunities, and franchises, and of acquiring by purchase, or otherwise, and of holding and conveying real and personal estate, which may be needful to carry into effect fully the purposes and objects of this act.

Section 2. That the corporators specifically named in the preceding section shall meet in the city of New York, at the room of the Chamber of Commerce, in the Merchants' Exchange, on the next first Tuesday in the month succeeding that in which this act shall be passed; which said time of meeting shall be not less than thirty days, nor more than sixty days, after the passage of said act. And it shall be the duty of said corporators, at their first meeting, to determine whether or not they will except the charter; and if the same be excepted, to give notice immediately of such acceptance to the governor of the Territory of Minnesota, by certificate to that effect, signed by the corporators present, but not under seal, properly addressed, and deposited in the post office in the city of New York. It shall also be the duty of the corporators, at their first meeting, to make such arrangements as may be proper and necessary for the future meetings, for the organization of the company, and the issue of capital stock.

Section 3. It shall be the duty of the above named corporators, within sixty days after the acceptance of this charter, to cause to be opened at some designated place in the city of New York, and in the city of St. Paul, in this Territory, books for subscription to so much of the capital stock of said company as they may deem proper, giving twenty days' notice thereof in one or more public newspapers printed in the city of New York and in the city of St. Paul aforesaid; and after a sum not less than one million of dollars of capital stock of said company shall have been subscribed, and an instalment of not less than ten per cent. paid upon each share, then the subscribers shall become corporators of said company, and shall, within thirty days thereafter, proceed to elect a board of directors, which shall consist of not less than twelve stock-

holders, citizens of the United States of America, and three of them shall reside in the Territory or future State of Minnesota; and said directors so elected shall, within ten days thereafter, proceed to organize by the election of a president and such other officers as they may see fit to appoint, and until such organization the corporate powers of said company shall remain in and be exercised by the corporators hereinbefore specified.

Section 4. From and after the organization of the said board of directors, all the corporate powers of said company shall be vested in and controlled and exercised by said board of directors and such officers and agents as they shall appoint, three of whom shall hold the office of directors for one year; three others for two years; three others for three years, and the remaining three for four years; the time which each of the first board of directors shall hold his term of office to be determined by lot, within thirty days after the first organization of said board. At the expiration of the term of one year from the organization of said board, and every succeeding year thereafter, there shall be chosen three directors from among the stockholders of said company, due notice of such election having been first given by the board of directors, to supply the vacancies of those who go out, and each director shall continue in office until his successor is elected and assumes the trust conferred on him. Vacancies in the board may be filled by a vote of two-thirds of the directors remaining. Such appointees to continue in office until the next regular election of directors; but no person shall be so elected who shall not have been openly nominated at a meeting of the directors, at least one week before the time appointed for such election. Other officers, agents and servants, whether members of the board or otherwise, shall be entirely subject to the control of the board. In every election of directors, or for any other purpose, each share of capital stock shall be entitled to one vote, to be given in person or by proxy. A majority of the board of directors shall constitute a quorum for the transaction of business.

Section 5. The said directors shall have the power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfil the purposes and carry into effect the provisions of this act, and for the well-ordering, regulating, and securing the affairs and business of the company, and such by-laws, rules, and regulations shall have the force and effect of law: Provided, that the same be not repugnant to the Constitution and laws of the United States, or repugnant to the laws of the Territory or future State of Minnesota, or to this act. The board of directors shall have power to establish such rates of toll for reconveyance of persons and property upon the railroad, by this act authorized to be built, as they shall from time to time by their resolutions direct and determine, and to levy and collect the same for the use of the said company. The transportion of persons and

property, the width of track, the construction of wheels, the size of cars, the weights of loads, and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be exclusively within the control of said board of directors, and in conformity to such rules and regulations as they shall from time to time determine. Said board of directors may have power to hold its meetings in the city of New York, and to order and hold all elections for directors in said city.

Section 6. The capital stock of said corporation shall be ten millions of dollars, which may be increased from time to time to any sum not exceeding the entire amount expended on account of said road, divided into shares of one hundred dollars each, which shall be deemed personal property, and may be issued and transferred in such manner and at such places as may be ordered and provided by the board of directors, who shall have power to require the payment of sums subscribed by stockholders, in such manner and on such terms as they may *be* deem proper; and on refusal or neglect on part of the stockholders, or any of them, to make payments on the requisition of directors, the shares of such delinquent may, after thirty days' public notice, be sold at public auction, under such rules as the said board of directors may adopt; the surplus money, if any remains after deducting the payments due, with the interests and necessary costs of sale, to be paid to such delinquent stockholders. Books for subscription to stock shall be opened by the board of directors in the city of New York and in the city of St. Paul, and may be opened in the city of London, from time to time, as said board may order.

Section 7. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain, and operate as a railroad, with one or more tracks or lines of rails, from a point on the northwest shore of Lake Superior, in Minnesota Territory, north of the St. Louis river, opposite the entrance of Lefthand river into Lake Superior, and near the mouth of the St. Louis river, Minnesota, on Lake Superior, by way of St. Anthony and St. Paul, in Minnesota, and cross the Mississippi at St. Paul, to such point on the northern boundary line of the State of Iowa as the board of directors may designate, which point shall be selected with reference to the best route to the city of Dubuque: Provided, that such location shall conform in all respects to such route as may be designated in any act of Congress granting lands for the construction of said railroad.

Section 8. The said corporation shall have the right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, by paying therefor in the manner hereinafter provided, land not exceeding two hundred feet in width through its entire length, and may enter upon and take possession of and use all and singular said lands, two hundred feet in width, and

all streams, minerals, and materials of every kind thereon, for the location of depots and stopping-stations, for the purpose of constructing bridges, dams, embankments, excavations, station-grounds, spoil-banks, turnouts, engine-houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. All such lands, waters, minerals, materials, and privileges belonging, or which may hereafter belong, to the Territory or future State of Minnesota, on and within said two hundred feet in width, are hereby granted to said corporation for said puposes, and for no other; and for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted, that any lands that may be granted to the said Territory, to aid in the construction of the said railroad, shall be, and the same are hereby, granted in fee simple, absolute, without any further act or deed; and the governor of this Territory or future State of Minnesota is hereby authorized and directed, in the name and in behalf of said Territory or State, after the said grant of land shall have been made by the United States to said Territory, to execute and deliver to said company such further deed or assurance of the transfer of said property, as said company may require, to vest in them a perfect title to the same: Provided, however, that such lands shall be taken upon such terms and conditions as may be prescribed by the act of Congress granting the same: Provided, also, that whenever the net earnings of said road shall exceed twenty per cent. on the amount of capital actually expended by said company in the construction and furnishing said road and appurtenances, the said corporation shall pay semi annually to the treasurer of the Territory or future State of Minnesota, and take his receipt for the same, seven per cent. of the net earnings of said railroad.

Section 9. Said company may take such lands for the construction of said road as may be deemed requisite by said corporation; but unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid, proper compensation for the lands so taken shall be made, which shall be ascertained and determined in the manner following: The said party or parties interested may present to the circuit or district or county court of the circuit or district or county, where said lands or real estate proposed to be taken shall lie, a petition, signed by its attorney or agent, describing with convenient accuracy and certainty, by map or otherwise, the lands or real estate so required to be taken as aforesaid, setting forth the name and residence of each owner or other person interested therein as owner, lessee, incumbrancer, as far as known to such attorney or agent, or appearing of record, and praying the appointment of commissioners to ascertain the compensation to be made such owners and others interested for the taking or injuriously affecting such land or real estate as aforesaid.

The court shall have satisfactory evidence that notice of an intended application, and the time and place thereof, for the appointment of commissioners of appraisement between said corporation and the owners and persons interested in such lands and real estate, had been given at least ten days previously to such owners personally, or to their agent or attorney, at their residence or on the premises, or by publication thereof for four weeks previous to such application, in a newspaper printed in the county in which said lands or real estate may lie, or if no newspaper be printed in said county, in a newspaper printed at the capital of this Territory, and also in a newspaper published at the shortest distance within said Territory or State from the place where the said land lies, such publication to be allowed only in respect to owners who shall appear by affidavit to have no residence in the county known to such agent or attorney whereat such notice could be delivered as aforesaid. The court may adjourn the proceedings from time to time; it may direct any future notice thereof to be given that may seem proper; it shall take proof and allegations of all parties interested, touching the regularity of the proceedings, and shall, by an entry in its minutes, appoint three competent and disinterested persons, who shall be freeholders of said county, commissioners to ascertain such compensation as aforesaid, specifying in such entry a time and place for the first meeting of such commissioners. The said commissioners, before entering upon the duties of their office, shall take the oath required by the laws of this Territory or the future State of Minnesota, and any one of them may administer oaths to witnesses produced before them, and may adjourn from time to time. Whenever they shall meet to hear proofs and allegations, unless by appointment of the court or pursuant to adjournment, they shall cause ten days' previous notice of such meeting to be given to the said owners or parties interested, or their attorney or agent, and may each of them issue subpœnas and compel witnesses to appear and testify. They shall hear the proofs and allegations of the parties, and three or more of them, after reviewing the premises without fear or favor, or partiality, ascertain and certify the compensation proper to be made to the said owners and parties interested for the lands or real estate to be taken, as well as all damages accruing to the owner of the lands and real estate aforesaid taken in consequence of the condemnation of the same, or injuriously affected as aforesaid; may, in their discretion, assess a separate reasonable sum in favor of such owner and parties interested, or of any person appointed by the court to appear as attorney for them, for costs, expenses, and reasonable counsel fees. They, or a majority of them, shall make, subscribe, and file with the clerk of the county in which such lands or real estate shall lie, a certificate of their said ascertainments and assessment, in which such lands or real estate shall be described by map or otherwise, with convenient ac-

curacy and certainty. The court, upon such certificate and due proof that such compensation and separate sum, if any be certified, have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in the State treasury, or other place for that purpose approved by the court, shall make and cause to be entered in its minutes a rule describing such lands or real estate in manner aforesaid, such ascertainment or compensation, with the mode of making it, and such payment or deposit of same compensation as aforesaid, a certified copy of which rule shall be recorded and indexed in the proper recording office in like manner and with the like effect as if it were a deed of conveyance from the said owners and parties interested to said corporation. Upon the entry of such rule, the said corporation shall become seized in fee of all lands and real estate described in said rule, as required to be taken as aforesaid, during the continuance of the corporation, by this or any subsequent act, and may take possession of, and hold, and use the same for the purposes of said road, and shall thereupon be discharged of all claims for any damages by reason of any matter specified in said petition, certificate, or rule of said court.

If at any time, after an attempt or actual ascertainment or compensation, under this or any other act, or any purchase by, or donation to, said corporation, of any lands, for the purposes aforesaid, it shall appear that the title acquired thereby to all or any part of such lands, for the use of said road, or if the title of said corporation shall fail or be deemed defective, the said corporation may proceed anew to perfect such title, by procuring an ascertainment of the compensation proper to be made to any person or persons whose title, claim, or interest in, or lien upon, such land: and by making payment thereof in the manner hereinafter provided, as near as may be, at any stage of such proceedings, or of any proceedings under this act, the court or officer to whom the application shall be made, may, by a sale in that behalf made, authorize the said corporation, if already in possession, and, if not in possession, to take possession of, and use such premises during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against said corporation, on account thereof: Provided such corporation should pay a sufficient sum into court, or give security, to be approved by said court, to pay the compensation in that behalf, when ascertained; and in every case when possession shall be authorized, it shall be lawful for the owners to conduct the proceedings to a conclusion, if the same shall be delayed by the company. The said commissioners shall be entitled to receive from said corporation a compensation not exceeding five dollars for each day actually employed by them in the discharge of their duties—such compensation to be taxed and allowed by the court, and which shall be paid by such corporation. If any commissioners so appointed shall die, be unable or

fail to serve, the court may appoint another in his place, on reasonable notice of the application, to be approved by the court. The proceedings hereby authorized may be had in the district court of any county where the lands lie; and all motions to the district court shall be made at a general or special term thereof, in said county. The said commissioners shall file the said certificate in the office of the clerk of the district court of the county where the lands to be affected may lie; and any clerk shall, when presented with an order from the court for that purpose, transfer a certified copy of the same, and the proceedings connected therewith, to the clerk of any other county in which any portions of the lands to be affected may lie, whenever such clerk shall be so required by said corporation, its agent, or attorney.

Section 10. For the purpose of raising funds from time to time for the construction and completion of said road, and the purchase of iron and other materials to be used thereon, and for other purposes connected with the construction and completing of said road, said company may issue its bonds in such form, and for such amounts, and at such rates of interest, payable at such time and places as the said board of directors may by their by-laws direct. The payment of said bonds may be secured by a deed of trust or mortgage of the franchise, lands, road, and materials belonging to said company, or all or either of them: Provided, that the faith of the Territory or future State of Minnesota shall be in no wise pledged for the redemption of said bonds, and that no banking privileges are hereby granted to said company.

Section 11. If any person shall certify wilfully, maliciously or wantonly delay or obstruct the passage of any carriage on said road, or shall place, or cause to be placed, any material thereon, or in any way trespass upon, spoil, injure, or destroy said road, or any part thereof, or anything belonging or pertaining thereto, or employed or used in connection with their location, survey, construction, or management, all persons committing, or aiding and abetting in the commission of, such trespass or offence, shall forfeit and pay to said company treble such damages as shall be proved before any court of competent jurisdiction, and shall be imprisoned until the payment thereof, unless sooner discharged by due proceedings of law; and further, such offenders shall be liable to indictment in the county within whose jurisdiction the offence may be committed, and pay a fine of not less than thirty nor more than one thousand dollars, to the use of the people of the Territory and future State of Minnesota; or may be imprisoned in the penitentiary or jail, for a term not exceeding five years, in the discretion of the court before whom the same shall be tried.

Section 12. Said corporation may construct their said road over or across any stream of water, water-course, road, highway, railroad or canal; not, however, in such manner as to interrupt or im-

pede the navigation of any navigable stream or highway; and all roads or railroads laid out subsequently to the completion of any part of the said railroad which may cross or intersect the same, shall be laid out and constructed at the point of intersection, in a manner that will do the least damage to said railroad.

Whenever the track of said railroad shall cross a road or highway such road or highway may be crossed at grades, or carried under or over said track, as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of said road or highway desirable, with a view to more easy ascent or descent, the said company may take such additional lands for the construction of said road or highway, as may be deemed requisite by said corporation, unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid. Compensation shall be ascertained in the manner in this act provided, and duly made by said corporation to the owners and persons interested in such lands; the same when so taken, or compensation made, to become a part of such intersecting road or highway, in such manner, and by such tenure, as the adjacent parts of the same highway may be held for highway purposes: Provided, that the present or any subsequent legislature of the Territory or future State of Minnesota may authorize any railroad or highway to cross or intersect the said railroad, on such terms as will do the least damage to said railroad company.

Section 13. Every conductor, baggage-master, engineer, brakeman, or other servant of such corporation, employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, initial letters or style of the corporation. No conductor or collector, without such badge, shall demand or be entitled to receive from any passenger any fare, toll or ticket, or exercise any of the powers of this office; and no other of said officers or servants, without such badge, shall have any authority to meddle or interfere with any passenger, his baggage or property.

Section 14. A bell of at least thirty pounds weight, or a steam-whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where said road shall cross any other road, and shall be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation, one half to go to the informer and the other half to the Territory or future State of Minnesota, and to be liable for all damages which shall be sustained by any person by reason of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained, across each public road or street where the same is crossed by the railroad, on such elevation as not to obstruct the travel, and

to be easily seen by the travellers; and on each side of said board shall be printed, in capital letters of at least the size of nine inches each, the words, "Railroad crossing. Look out for the cars." But this provision shall not apply to streets of cities or villages, unless the corporation be required to put up such boards by the officers having charge of such streets. Said company shall construct and maintain a good, substantial, board or rail fence, five and one-half feet high, along said railroad in the line of the lands by this act granted them, and shall construct and maintain cattle-guards wherever the same may be necessary, sufficient to keep cattle, sheep, horses, and hogs from off the track of said railroad, and shall be liable for all damage sustained by any person by reason of any neglect to keep and maintain such fence and cattle-guard in good repair.

Section 15. Said corporation shall, within a reasonable time after said road shall have been permanently located, cause to be made a map and profile thereof, and of the lands taken and obtained for the use of said road, and file the same in the office of the secretary of the Territory or the future State of Minnesota; and also a like map of the parts thereof located in the different counties through which the same may pass, and cause the same to be recorded in the office for recording deeds in the county in which said parts of said road shall lie; and also where any relocation of said line or lines may have been made as hereinbefore authorized, then a like map, or the profile thereof, shall be made and filed in the manner and places aforesaid.

Section 16. This act, and all grants herein contained, shall be void unless said company shall render to the governor of this Territory, on or before the first day of January of each and every year, a statement in writing, verified by the oath of the president and treasurer of said railroad company, exhibiting the amount of capital actually expended by said company in the construction of said road, and the machinery thereof and appurtenances thereunto belonging, and the amount of their receipts and their expenditure during the year; and unless said board of directors shall be organized on or before the first day of July, 1854; and unless said company shall construct and complete at least fifty miles of the track of said main road, from the point on Lake Superior designated in this act as the starting point of said road, within three years after the acceptance of this charter, as provided in this act, and the whole of said main road within three years thereafter, and the whole of the track of said main road shall be laid with a rail not less than sixty pounds per yard, and the engines and rolling stock of the road shall be made in all respects equal to those on the best description of road in the United States; and unless said company shall construct, complete, and maintain, and keep in operation, a line of telegraph from Dubuque to St. Paul, upon the route of said

road, within twenty months after the formation of the first board of directors under this act.

Section 17. All acts or parts of acts that in any manner conflict with this act, or the rights and franchises hereby granted, are hereby repealed: Provided, said company *except* this charter in the manner and form as provided in section 2: And provided, also, that nothing herein contained shall be so construed as to repeal or in anywise vitiate any charter for the construction of a bridge across the Mississippi river: And provided, further, That the passage of this act shall not vitiate or render void any railroad charter heretofore granted by the legislative assembly of this Territory.

Section 18. This act shall be deemed a public act, and shall be in force from and after its passage.

Section 19. In case the persons incorporated by this act shall fail or neglect to accept the provisions of the same, and comply with its conditions within the time and in manner herein prescribed, the same may be *excepted* by any other company which shall be approved by the governor, auditor, and treasurer of this Territory, who, upon complying with the terms and conditions of this act, shall be vested with all rights, powers, and immunities conferred upon the corporators herein named, and shall be subject to all the liabilities in the said act set forth, in as full, ample, and complete a manner as if their names were inserted as corporators in this act.

U. C. D. TAYLOR,
Speaker of the House of Representatives.
S. B. OMSTEAD,
President of the Council.

Approved, March 4, 1854.

W. A. GORMAN.

Which act has not been repealed nor modified, except as hereinafter stated; but, at the time of the said alleged trespasses, and each of them, was, and now is, in full force, with the amendments hereinafter set forth:

That after the passage and approval of the said act as aforesaid, and on the first Tuesday of the month of April, eighteen hundred and fifty-four, being the month next succeeding that in which the said act above mentioned was passed, and not less than thirty nor more than sixty days after such passage, the corporators named in the first section of the said act met in the city of New York, at the room of the Chamber of Commerce, in the Merchants' Exchange, being the first meeting of the said corporators, and then and there determined that they would, and they then and there did, accept the said charter, and immediately and upon the same day gave notice of such acceptance to the then governor of the Territory of Minnesota, by certificate to that effect, signed by the corporators present at the said meeting, but not under seal, pro-

perly addressed to "His Excellency Willis A. Gorman, governor of the Territory of Minnesota," at St. Paul, Minnesota, where the said governor then resided, and deposited upon the same day in the post office in the city of New York. And at the same first meeting, the said corporators made such arrangements as were proper and necessary for the future meetings, for the organization of the said company and the issue of capital stock; that is to say, the said corporators then and there appointed a committee, consisting of three of their number, to wit, Alexander Ramsey, George W. Billings, and Curtis B. Raymond, and authorized and empowered the said committee to open books for subscription to one million dollars of the capital stock of the said company, to be opened at the office of Borup & Oakes, in the city of St. Paul, and at the Bank of the Republic, in the city of New York, on the first day of May, eighteen hundred and fifty-four, and to receive such subscriptions and an instalment of ten per cent. upon each share, and gave twenty days' notice thereof in two public newspapers printed in the city of New York and in the said city of St. Paul; and, at the same time, further authorized and empowered the said committee to call future meetings of the said corporators and the persons who should become subscribers to the capital stock of the said company. That on the said first day of May, eighteen hundred and fifty-four, books of subscription to the capital stock of the said company were, on the said first day of May, eighteen hundred and fifty-four, opened by and under the direction of the said committee, at the office of Borup & Oakes, in the city of St. Paul, and at the Bank of the Republic, in the city of New York. That after the opening of the said books as aforesaid, and on or about the twentieth day of May, eighteen hundred and fifty-four, subscriptions were duly made upon the said books, at St. Paul, to the amount of two hundred dollars; and twenty dollars, being ten per cent. of the amount of the said subscriptions, was, at the time of the making thereof, duly paid by the said subscribers to the said committee. That afterwards, and on the twenty-ninth day of June, eighteen hundred and fifty-four, an act was passed by the Congress of the United States, and duly approved by the President thereof, and became, and was, and now is, a law, in the following words, that is to say:

An act to aid the Territory of Minnesota in the construction of a Railroad therein.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from the southern line of said Territory, commencing at a point between township ranges nine and seventeen; thence by the way

of St. Paul, by the most practicable route, to the eastern line of said Territory, in the direction of Lake Superior, every alternate section of land designated by odd numbers, for six sections in width on each side of said road, within said Territory; but in case it shall appear that the United States have, when the line of said road is definitely fixed by the authority aforesaid, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory, subject to the approval of the Secretary of the Interior, to select from the lands of the United States, nearest to the tier of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, which land (thus selected in lieu of those sold, and to which pre-emption has attached as aforesaid, together with the sections or parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Territory of Minnesota for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the road in each case, and selected for and on account of said road: Provided further, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever: And provided further, that any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroad through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Section 2. And be it further enacted, That the sections and parts of sections of land which, by such grants, shall remain to the United States within six miles on each side of said road, shall not be sold for less than double the minimum price.

Section 3. And be it further enacted, That the said lands hereby granted to the said Territory shall be subject to the disposal of any legislature thereof for the purpose aforesaid, and no other; nor shall they inure to the benefit of any company heretofore constituted and organized; and the said railroad shall be and remain a public highway for the use of the United States, free from toll or other charge upon the transportation of any property or troops of the United States, nor shall any of the said lands become subject to private

entry until the same shall have been first offered at public sale at the increased price.

Section 4. And be it further enacted, that the lands hereby granted to said Territory shall be disposed of by said Territory only in the manner following, that is to say: no title shall vest in the said Territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, until a continuous length of twenty miles of said road shall be completed through the lands hereby granted; and when the Secretary of the Interior shall be satisfied that any twenty miles of said road are completed, then a patent shall issue for a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of said road, until it shall be completed; and if said road is not completed within ten years, no further sale shall be made, and the land unsold shall revert to the United States.

Section 5. And be it further enacted, That the United States mail shall be transported at all times on said railroad, under the direction of the Post Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.

Approved June 29, 1854.

That after the passage of the act last above mentioned, and on the thirtieth day of June, eighteen hundred and fifty-four, subscriptions to the capital stock of the said railroad company were duly made upon the said books, which had been opened in the city of New York as aforesaid, to the amount of one million dollars, and an instalment of ten per cent. upon each share of the stock so subscribed was, at the time of the making such subscription, duly paid by the persons making the same to the said committee; that after the said subscriptions had been made, and the said instalments had been paid as aforesaid, and on the first day of July, 1854, all the persons who had subscribed to the capital stock of the said company upon the books so opened in the city of New York, met together in the said city, in pursuance of notice previously given by the said committee, and proceeded to and did duly elect twelve of the stockholders of the said railroad company, who were then citizens of the United States of America, and three of whom then resided in the said Territory of Minnesota, to be the directors of the said company; and that immediately thereafter, and upon the same first day of July, 1854, the said directors so elected proceeded to and did organize by the election of a president and other officers, and then and there duly elected a president, vice president, secretary, treasurer, and counsellor of the said company; and that within ten days thereafter, each and all the

said officers so elected duly accepted their said several offices, and respectively entered upon the discharge of the duties thereof.

That afterwards, on the 17th day of February, A. D. 1855, an act was passed by the legislature of the Territory of Minnesota, amending the act incorporating the said company, which said act is in the words and figures following, to wit:

An act to amend an act entitled "An act to incorporate the Minnesota and Northwestern Railroad Company."

Section 1. Be it enacted by the legislative assembly of the Territory of Minnesota, That the eighth section of the act entitled "An act to incorporate the Minnesota and Northwestern Railroad Company" be and the same is hereby amended, by striking out so much of the said section as follows the words "provided, also," and inserting in the place thereof the words following, that is to say: That whenever and so soon as the net earnings of the said road received by the said company shall have exceeded twenty per cent. or one-fifth of the *of the* amount of the capital actually expended by the said company in payment for lands and rights of way, and in constructing and furnishing the said road and appurtenances, the said company shall forever thereafter pay semi-annually to the treasurer of the Territory or future State of Minnesota seven per cent. of the net earnings of the said railroad which shall have accrued and been received by the said company within the six months next preceding the times of said respective payments; the first of said payments to be made at the expiration of six months from and after the said twenty per cent. in net earnings shall have been received by the said company; and for the purpose of ascertaining the proceeds, receipts, or income of the said road, an accurate account shall be kept by the said company; which account shall every six months, and at the time of the making of the said payments to the treasurer, be furnished to the governor of the Territory or State by the said company, duly verified by the affidavits of its president and treasurer. The governor of said Territory or State, or any other person duly appointed by law, shall have power to examine the books and papers of the said corporation, and to examine under oath the officers, agents, and employees of the said company, and other persons, for the purpose of testing the accuracy of the said account, so as aforesaid to be furnished by the said company; and if any person so examined by the governor, or other authority, shall knowingly or wilfully swear falsely, or if the officers making such affidavits, or the verifications mentioned in the second section of this act, shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury. The lands granted to said company by the act to which this is amendatory, shall be exempt from taxation under the laws of the Territory and future State of Min-

nesota, until patents shall have been duly issued therefor, upon the completion of each twenty miles of the said road, as contemplated in and by the act of Congress entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein, approved June 29th, 1854."

Section 2. The sixteenth section of the act to incorporate the Minnesota and Northwestern Railroad Company is hereby repealed. The said company shall render to the governor of the Territory or future State of Minnesota on or before the first day of January in each and every year a statement in writing, verified by the oath of the president and treasurer of the said railroad company, exhibiting the amount of capital actually expended by the said company in the construction of the said road, and the machinery therefor, and appurtenances thereunto belonging, with the amount of their receipts and expenditures during the year. The said company shall construct and complete at least fifty miles of the track of the said railroad between the point where it crosses the Mississippi river and the northern terminus of the said road within three years from the passage of this act, and the whole of the remainder of the said railroad from the said northern terminus to the line of the State of Iowa shall be constructed and wholly completed by the said company within six years from and after the passage of this act. The whole of the track of the said railroad shall be laid with a rail not less than sixty pounds per yard, and the engines and rolling stock thereof shall be made in all respects equal to those of the best description of roads in the United States, within twenty-two months from and after the passage of this act, or in case the route of the said railroad between St. Paul and the Iowa line shall be sooner located and the timber cut off, then within thirty days after such timber shall have been cut off; the said company shall construct, complete, and keep in operation a line of telegraph from Dubuque to St. Paul and St. Anthony. The route or line of said road shall pass to a point not exceeding one and one-fourth of a mile from that portion of the Lake St. Croix, adjoining the eastern limits of the city of Stillwater, in said Territory; and also to and through the town of St. Anthony Falls, anything contained in the act to which this is amendatory to the contrary notwithstanding.

Section 3. In case the said company shall fail to construct and complete the said fifty miles of railroad between the northern terminus thereof and the point where said road crosses the Mississippi river within three years from the passage of this act, or to construct and complete the whole of the remainder of the said railroad within three years thereafter, or to construct and put in operation the said line of telegraph within the time limited by this act, then, and in either of the said cases, this act, and the said act to which this is amendatory, and all grants contained in the said

acts, or either of them, shall cease and be void, and all the lands granted to the said company, and then belonging to it, together with all its chartered rights and privileges, shall revert to the Territory of Minnesota.

Section 4. All contracts, obligations, bonds, certificates and agreements, which shall be entered into or executed in the name and behalf of the said company, by its proper officers or agents, or any of them, within the scope of the general or special powers conferred by the directors upon such officers or agents, shall be obligatory upon the said company, although, except in the case of bonds and contracts in relation to real estate, such instrument may not be verified by the common seal of the said company, nor especially authorized by such directors.

Section 5. In case the said company, its officers, agents and servants, or any or either of them, refuse to do or perform any duty required by this act, or the said act of incorporation, as hereby amended, the said company, its said officers, agents and servants, may, upon information filed by the attorney general of the said Territory or future State of Minnesota, or by any other officer designated by law for that purpose, be compelled by mandamus, or by the decree or judgment of any court having competent jurisdiction, to do and perform such duty; and may also be required and compelled to respond in such damages as the said Territory or State shall be found to have sustained in consequence of such failure or omission.

Section 6. The act entitled "An act to incorporate the Minnesota and Northwestern Railroad Company," is hereby re-enacted, subject to the amendments and provisions herein contained.

Section 7. This act shall be deemed a public act, and shall be in force from and after its passage.

Section 8. The legislature of the Territory or future State of Minnesota may repeal, amend or modify this act, and the act to which this is amendatory, from and after the expiration of twenty years from the date of the passage of this act: provided, that compensation be made to said company for all damages sustained thereby.

J. S. NORRIS,
Speaker of House of Representatives.
A. B. OLMSTEAD,
President of Council.

I hereby certify, that the above bill passed the house of representatives by a two-thirds vote, Feb. 16th, 1855.

JAMES C. SHEPLEY,
Chief Clerk House of Representatives.

I hereby certify, that the above bill passed the council by a two-thirds vote, Feb. 17th, 1855.

ANDREW JACKSON MORGAN,
Secretary of the Council.

I hereby certify the foregoing to be a correct copy of the original bill on file in this office.

J. TRAVIS ROSSER,
Secretary of Minnesota Territory.

That, afterwards, on the first day of March, A. D. 1856, an act was passed by the legislature of the Territory of Minnesota amending the act incorporating said company, and the above act amendatory thereof, which said act is in the words and figures following, to wit:

"An act granting an extension of time to the Minnesota and Northwestern Railroad Company, and for other purposes."

Be it enacted by the legislative assembly of the Territory of Minnesota:

Section 1. That the respective periods within which the Minnesota and Northwestern Railroad Company are now required by law to construct and complete portions of said road, contemplated in and by the charter of said company, and to construct and put in operation the telegraph therein mentioned, shall be, and the same hereby are, severally extended as follows, that is to say: The said telegraph shall be completed and put in operation on or before the 17th day of November, 1858, or in case the said railroad from St. Paul to the Iowa line shall be located and the timber be cut out of the line of said road before that day, then, in that case, the said telegraph shall be constructed and put in operation within sixty days after such timber shall have been cut out. Fifty miles of said road, running from St. Paul northwardly, shall be fully completed on or before the 17th day of February, 1860, and the remainder of the said road shall be fully completed and put in operation on or before the 17th day of February, 1863: Provided, however, that it shall be the duty of said company to locate the said road in conformity with the act of Congress entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," approved on the 29th day of June, 1854; and provided, also, that this extension of time to the said Minnesota and Northwestern Railroad Company, and all their rights, franchises, and privileges under their charter, shall be null and void; and the governor of said Territory shall, by proclamation, to be published in some newspaper in St. Paul and in the city of New York, so declare as notice to all concerned, upon the failure of said company to comply with the following condition, which is, that said Minnesota and Northwestern Railroad Company shall, on or before the fourth day of July, 1856, notify the governor of this Territory in writing, to be

signed by the president and secretary, or the acting president and acting secretary of said company, that they have and do *except* fully the provisions of this act as a part of their original charter, as approved by the governor of this Territory, on the 4th day of March, 1854, and with a certificate that the said *exceptance* is in obedience to directions previously given by the board of directors.

Section 2. In consideration of the grant of lands contemplated in the 8th section of the charter to said company, approved March 4th, 1854, and of the extension of time to said company, as herein stated, and in further consideration of the restoration of all rights, powers, and franchises to said company, which may be supposed to have for any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay, or cause to be paid to the Territory or future State of Minnesota two per cent. upon each dollar of the gross receipts, proceeds, and income of said railroad, so far as the same may be received or due them on that part of said road lying within the limits of the Territory or future State of Minnesota, to be paid to the treasurer of said Territory or future State annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road, in said Territory or future State of Minnesota, and which proceeds shall be appropriated to the territorial or State government expenses, and such payments shall be in lieu of, and the said company shall be exempt from, the payment of any other imposts, taxes, or dividends, any law to the contrary notwithstanding.

Section 3. And for the purpose of ascertaining the proceeds, receipts, or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the Territory or future State of Minnesota, the truth of which account shall be verified by the affidavits of the president and treasurer of said company; and for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the Territory or future State of Minnesota, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents, and employees of said company, and other persons; and if any person so examined by the governor, or other authority, shall knowingly and willingly swear falsely, or if the officers making such affidavits shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury. The Territory or future State of Minnesota shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes, and dues which may accrue to the Territory or future State from said corporation, as herein provided; which lien of the Territory or future State shall take precedence of all demands, judgments, or decrees against said corporation.

Section 4. Said company shall construct and put in operation a branch thereof to a point within one and a quarter miles of the eastern limits of Stillwater: Provided, it is consistent with the act of Congress approved 29th June, 1854, granting land to aid said Territory in the construction of a road therein.

Section 5. This act shall be in force from and after its passage.

CHARLES GARDNER,
Speaker of the House of Representatives.
JOHN B. BRISBIN,
President of the Council.

Approved March first, one thousand eight hundred and fifty-six.

W. A. GORMAN.

I hereby certify the foregoing to be a correct copy of the original bill on file in this office.

J. TRAVIS ROSSER,
Secretary of Minnesota Territory.

Which said last mentioned act was duly accepted by the said defendants, and notice of said acceptance duly given to the governor of said Territory, in the manner and within the time prescribed by said last mentioned act.

That on the 20th day of October, A. D. 1855, and while the said parcels of land upon which the trespasses mentioned in the complaint in this action, and therein alleged to have been committed, were each and all of them the property of the government of the United States, subject to the conditions of the said act of Congress, approved June 29th, 1856, and long before the said plaintiff had acquired or pretended to acquire any right, title, or interest in or *two* said parcels of land, or any of them, these defendants caused a survey to be made of the said route of the said railroad contemplated by, and mentioned in, the said act of the legislature of the Territory of Minnesota, and located such railroad upon a route commencing at a point upon the southern line of the said Territory, between the ranges nine and seventeen, designated by the board of directors of the said company, with reference to the best route to the city of Dubuque; thence running to and crossing the *the* Mississippi river at St. Paul, and thence by the most practicable route, and by the way of St. Anthony, to the eastern line of the said Territory, in the direction of Lake Superior, and thence to a point on the northwest shore of Lake Superior, in Minnesota Territory, north of the St. Louis river, opposite the entrance of Left-hand river, into Lake Superior, and near the mouth of the St. Louis river, Minnesota, on Lake Superior, being the same railroad route contemplated by and mentioned in the said acts of Congress and of said Territorial legislature, and so located the same, that

such location conformed and conforms, in all respects, to the route designated by the said act of Congress, and by the said acts of the Territorial legislature; that such location is so made between St. Paul and the southern line of said Territory, that the said railroad is located as aforesaid, upon, over, and across both the closes or parcels of land upon which the alleged trespasses mentioned in the complaint in this action are therein alleged to have been committed, and includes said parcel of land on section twenty-two, upon which the trespass in said complaint last mentioned is alleged to have been committed; that said parcel of land on section fifteen (15), upon which the trespass in said complaint first mentioned is alleged to have been committed, being a part of a section designated by an odd number, upon the line of said railroad, was at the time of said survey and location of the said railroad a portion of one of the sections granted to the Territory of Minnesota in and by said act of Congress; that the plaintiff purchased and entered the land upon which the closes aforesaid are situated, of the government of the United States, on or about the first day of January, A. D. 1856, and long after the aforesaid location and survey of said railroad over the same; and that this whole interest in and to said premises is, and was at the time of the alleged trespasses, derived from and under said purchase and entry. That after such survey and location were made as aforesaid, and on the twenty-fifth day of October, eighteen hundred and fifty-six, and at divers other times between that day and the day of the commencement of this action, the defendants, by and with their necessary agents, officers, and servants, did go upon that part of the several closes or parcels of land mentioned and described in the complaint in this action, upon and over which the said railroad was and is located as aforesaid, and upon no other part of the said land, for the purpose of constructing the said railroad, as the said defendants lawfully might do, and then and there, within the proper and necessary width of the track of the said railroad, as they had the lawful right to do, did cut down and prostrate the trees in the complaint in this action mentioned, and carefully removed the same from the said track, doing no unnecessary damage to the plaintiff, such cutting down, prostration, and removal being incident and necessary to the construction of the said railroad there, and that such cutting down, prostrating, and removing, and no other, are the several supposed trespasses in the complaint mentioned.

GEO. L. OTIS,
Defendants' Att'y.

Answer.

Personal copy of a copy hereof is admitted on the 15th day of Nov., 1854.

J. V. D. HEARD,
Pl'ff's Att'y.

Territory of Minnesota, District Court for 3d judicial district, Dakota county.

EDMUND RICE
vs.
THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY. } Reply.

The reply of the plaintiff, Edmund Rice, to the answer of the defendants in this action, respectfully shows to this court, that after the officers and directors of said company were elected, and entered upon the discharge of their duties, as mentioned in the said answer, and before the said trespasses, or either of them, were committed, to wit, on the fourth day of August, in the year 1854, an act was passed by the Congress of the United States, and approved by the President thereof, in the following words, to wit:

"An act for the relief of Thomas Bronaugh, and for the repeal of the act to aid the Territory of Minnesota in the construction of a railroad therein," approved the twenty-ninth day of June, eighteen hundred and fifty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby directed to increase the pension of Thomas Bronaugh, who is now on the rolls at four dollars, to the rate of eight dollars per month, to commence January first, eighteen hundred and fifty-four.

Section 2. And be it further enacted, That the bill entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," which passed the House of Representatives on the twentieth day of June, eighteen hundred and fifty-four, and which was approved by the President of the United States on the twenty-ninth day of June, eighteen hundred and fifty-four, be, and the same is hereby repealed.

Approved August 4, 1854.

J. V. D. HEARD,
Pl'ff's Att'y.

Dec. 1, 1856.

Personal service of a copy hereof is admitted on 1st day of Dec., 1856.

GEO. L. OTIS,
Def't's Att'y.

A true copy, certified by me Jan. 12th, 1857.

R. A. IRWIN, *Cl'k.*
By J. J. NOAH, *Dep'y.*

Territory of Minnesota, District Court for 3d district, Dakota county.

EDMUND RICE
vs.
THE MINNESOTA AND NORTHWESTERN RAILROAD CO. } Demurrer.

The defendants demur to the reply of the plaintiff in this action, and say that the matters therein alleged are not sufficient to entitle the plaintiff to maintain this action against the defendants, because they say that the act of Congress mentioned and set forth in said reply is void and of no effect, so far as it relates to the repeal of the act of Congress approved June 29, 1854, mentioned and set forth in the answer of the defendants.

GEO. L. OTIS,
Def't's Att'y.

Dec. 13, 1856.

A true copy, certified by me Jan. 12, 1857.

R. J. IRWIN, *Cl'k.*
By J. J. NOAH, *Dep'y.*

District Court 3d district, Dakota county.

EDMUND RICE
ag't
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY. } January 7th, 1857.

This cause having this day been brought on for argument upon the defendant's demurrer to the plaintiff's reply, and after hearing Mr. Otis, of counsel for the defendant, in support of the demurrer, and Mr. Hurd, of counsel for the plaintiff, in opposition thereto, it is ordered that the said demurrer be, and the same is hereby, overruled, and that the plaintiff have judgment on the said demurrer, and that the plaintiff's damages be assessed by a writ of inquiry.

A. G. CHATFIELD,
Judge, &c.

A true copy, certified by me Jan. 12, 1857.

R. A. IRWIN, *Cl'k.*
By J. J. NOAH, *Dep'y.*

TERRITORY OF MINNESOTA,
County of Dakota.

District Court, third Judicial District, for said county and Territory.

EDMUND RICE
against
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

January 8th, 1857. Order of court disallowing demurrer to

court aforesaid, the above-named plaintiff recovered a judgment against the above-named defendants on the demurrer of the defendants to the reply of the plaintiff, and by which said judgment the plaintiff was allowed to have his writ of inquiry to ascertain his damages; and the above-named defendants feeling aggrieved thereby, intend now to appeal therefrom to the supreme court of the Territory of Minnesota:

Now, therefore, we, Geo. L. Otis, Wm. K. Rice, and Justus B. Rice, of St. Paul, in the Territory of Minnesota, do hereby, pursuant to the statute in such case made and provided, undertake that the said defendants will pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars; and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said defendants will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it affirmed only in part, and all damages which shall be awarded against said defendants on the said appeal.

Dated St. Paul, Jan'y 12, 1857.

GEO. L. OTIS. [SEAL.]
J. B. RICE. [SEAL.]
WM. K. RICE. [SEAL.]

I hereby accept and approve the within sureties, and waive affi't justification, Dec. 12, 1856.

J. V. D. HEARD,
Pl'ff's Att'y.

A true copy, certified by me.

R. A. IRWIN, *Cl'k.*
By J. J. NOAH, *Dep'y.*

Territory of Minnesota, Supreme Court—General Term, January, 1857.

EDMUND RICE
vs.
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY. } Points of plaintiffs.

First. No title to the lands granted by Congress by the act of June 29, 1854, vested in the Territory of Minnesota or could vest.

Second. The defendants acquired no rights under the act of incorporation and the act of Congress.

Third. No rights having vested, Congress could resume the grant, and the repealing act was valid and effectual.

J. V. D. HEARD,
Pl'ff's Att'y.

Jan. 16, 1857.

plaintiff's reply filed, and judgment thereupon entered in favor of plaintiff, and against defendant, for his damages, to be assessed by a writ of inquiry, besides the costs of this court, taxed by me at thirty-seven dollars.

Costs of demurrer to plaintiff.....$29 00
" of clerk 8 00

Costs of clerk paid.....$37 00

Attest: R. A. IRWIN, *Clerk.*
By J. J. NOAH, *Deputy.*

Notice of Appeal.

Territory of Minnesota, District Court for 3d judicial district, Dakota county.

EDMUND RICE
vs.
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

You will please to take notice that the defendants' appeal to the supreme court of the Territory of Minnesota from the judgment entered in this action in the district court for the third judicial district and county of Dakota, on the 8th day of January, A. D. 1857, in favor of the plaintiff, and against the defendants, to the effect that the plaintiff have his damages assessed by writ of inquiry, as prayed in his complaint; and also from the order made in said action overruling the demurrer to the plaintiff's reply, and directing judgment to be entered for the plaintiff in this action, bearing date the 7th day of January, 1857, and entered on the day first aforesaid.

Yours, &c.,
GEO. L. OTIS,
Def't's Att'y.

To J. V. D. HEARD, Esq., *Pl'ff's Att'y,*
And to R. A. IRWIN, *Clerk of said Court.*

Dated St. Paul, Jan'y 12th, 1857.

A true copy, certified by me Jan. 12, 1857.
R. A. IRWIN, *Clerk.*
By J. J. NOAH, *Dep'y.*

Territory of Minnesota, District Court for 3d judicial district, Dakota county.

EDMUND RICE
vs.
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

Whereas, on the 8th day of January, A. D. 1857, in the district

Dist. Court, 2d judicial district, Dakota county.

EDMUND RICE
vs.
THE M. & N. W. R. R. Co.
Points for defendants in the argument of the demurrer to reply.

First. By the act of Congress, approved June 29, 1854, granting certain lands to the Territory of Minnesota, to aid in said Territory in constructing a railroad, the Territory "eo instanti" upon the passage of the act, acquired an interest and property in the lands granted which the Territory could grant and convey.

Second. By the act of the legislature of Minnesota, approved March 4, 1854, incorporating the "Minnesota & Northwestern Railroad Company," the said company acquired an interest and property in all the land subsequently granted by Congress to the Territory for the purposes of the road; which interest became vested in said company immediately upon the passage of the act of Congress and the organization of the company.

Third. The second section of the act of Congress, passed August 4, 1854, repealing the first mentioned act of Congress is repugnant to the Constitution of the United States, and also to great and fundamental principles which have been recognised as binding from time immemorial, wherever the common law prevails.

GEO. L. OTIS,
Def't's Att'y.

Jan. 19, January General Term, A. D. 1857, 7th day.

EDMUND RICE, Respondent,
against
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY, App't.
Appeal from the District Court of Dakota county.

This day this cause came on to be heard, having been brought to this court by appeal from the district court for the county of Dakota, and was argued by the counsel of the respective parties and submitted to the court.

And mature deliberation having been thereupon had, it appears to this court that in the order and judgment aforesaid, in the district court aforesaid, there is manifest error.

Wherefore it is considered, ordered and adjudged by the court here that the said order and the judgment rendered thereupon to this court, appealed from, be, and the same is hereby, in all things reversed, with costs to the appellant.

A true record. Attest: G. W. PRESCOTT,
Clerk.

A true transcript from the record.
Attest: G. W. PRESCOTT, *Clerk.*

Supreme Court for the Territory of Minnesota, ss.—January, 1857, General Term.

EDMUND RICE, Respondent,
against
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY, Appellants.

This cause having been brought to this court by appeal from the district court for the county of Dakota, came on to be heard, by the agreement of parties, at the regular January term of the said supreme court, upon the transcript of the pleadings, order and judgment therein of the said district court, duly certified, and was argued by counsel; and the same being seen and by the court now here fully understood, and mature deliberation having been thereupon had, it appears to this court that in the order and judgment aforesaid, in the district court aforesaid, there is manifest error. Wherefore it is considered, ordered and adjudged by the court here that the said order and judgment rendered thereupon to this court, appealed from, be, and the same is hereby in all things reversed with costs to appellant.

Dated January 19, 1857.

GEO. W. PRESCOTT, *Clerk.*

A true transcript of the record.

Attest: GEO. W. PRESCOTT, *Clerk.*

EDMUND RICE, Resp't,
vs.
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY, App'ts.

Transferred under act of Congress from the supreme court of the late Territory of Minnesota.

November 17th, A. D. 1858. This day came the appellants, defendants, by Geo. L. Otis, their attorney, and filed notice of motion in the following words, to wit:

U. S. District Court for the State of Minnesota.

Edmund Rice against the Minnesota and Northwestern Railroad Company.

Sir: You will please to take notice that on the records in this cause now in this court, on Wednesday the 17th inst., at 11 o'clock a. m. of that day, before Hon. R. R. Nelson, judge of this court, at his chambers in St. Paul, an application will be made to amend the records in this cause by the entry of a final judgment, pursuant to the order of the dist. court for the 3d dist., made in this cause Jan'y 7th, 1857; and to the stipulation of counsel for that purpose, and by amending the notice of appeal to the supreme court Min.

Ter., to conform to said judgment, and by striking out the order of judgment and judgment of the said supreme court, and the entry of the proper order and of final judgment pursuant thereto; and for such other and further relief as to said court may seem meet and proper. Which notice was endorsed as follows:

"Personal service of a copy hereof is hereby admitted, the first day of Nov., 1858, and I waive all questions as to regularity as to time of notice.

J. V. D. HEARD,
Att'y for Pl'ff."

Judgment roll from supreme court of late Territory of Minnesota also filed, and the following order was made and filed, to wit:

"This cause came on to be heard, on the seventeenth day of November, in the year eighteen hundred and fifty-eight, before the Honorable Rensselear R. Nelson, judge of said district court of the United States for the district of Minnesota, at his chambers in the city of Saint Paul, upon the motion of the defendants herein, to amend the records in this cause, by the entry of a final judgment, pursuant to the order of the district court for the third district of the then Territory of Minnesota, made in this cause on the 7th day of January, A. D., 1857, and to the stipulation of counsel for that purpose, and by amending the notice of appeal to the supreme court of said Minnesota Territory to conform to said judgment, and by striking out the order of judgment and judgment of the said supreme court, and entry of the proper order and of final judgment pursuant thereto; and for such other and further relief as to said court may seem meet and proper; and the said plaintiff, by J. V. D. Heard, his attorney, having in writing admitted service of notice of said motion, and waived all questions as to regularity as to time of notice, and having heard the allegations and arguments of said defendants, by Geo. L. Otis, their attorney, and having inspected the files and records in said cause, it is now by this court ordered, that the clerk of this court enter a final judgment in this action in favor of the defendants, appellants in said supreme court, pursuant to the order made in said supreme court, on the nineteenth day of January, in the year eighteen hundred and fifty-seven.

Dated Nov. 17th, A. D. 1858.

R. R. NELSON,
U. S. Dist. Judge."

And thereupon, pursuant to the said order of court, it is now, to wit, on this seventeenth day of January, in the year eighteen hundred and fifty-eight, by this court considered, ordered and adjudged, that the judgment and order of the district court of the third district aforesaid, which was to said supreme court appealed from, be and the same are hereby in all things reversed; and it is further considered and adjudged that the plaintiff, Edmund Rice,

take nothing by his said action, and that the defendants recover of said plaintiff the sum of fifty-nine dollars for their costs in said action.

Costs $59 00.

Judgment record signed this 17th day of November, A. D. 1858.

GEO. W. PRESCOTT, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

To the Minnesota and Northwestern Railroad Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the State of Minnesota, wherein Edmund Rice is plaintiff in error, and you, The Minnesota & Northwestern Railroad Company, are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. R. R. Nelson, judge of the district court of the United States for the State of Minnesota, this 1st day of August, A. D. one thousand eight hundred and fifty-nine.

R. R. NELSON, *Judge, &c.*

Due service of a copy hereof is hereby admitted, Aug. 1, 1859.

GEO. L. OTIS,
Att'y for Def'ts in Error.

Filed 2d Feb., 1860.

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Supreme Court of the United States.

DECEMBER TERM, 1862.

EDMUND RICE,

PLAINTIFF IN ERROR,

vs.

THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

WRIT OF ERROR TO THE U. S. DIST. COURT FOR MINNESOTA.

PLAINTIFF'S POINTS.

New-York:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU STREET, CORNER OF LIBERTY.

1862.

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, 1862.

EDMUND RICE, Plaintiff in Error, *vs.* THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.	Writ of Error to the U S. District Court, Minnesota.

Abstract of the Case.

Rice, the plaintiff, sued the defendants in a district court of Minnesota, for trespass alleged to have been committed on the 25th October, 1856, upon land belonging to the plaintiff, and laid his damages at $2,200.

The defendants answered, setting up an act of the Territory of Minnesota, passed 4th March, 1854, incorporating the Minnesota and Northwestern Railroad Company. (See Record, p. 3.)

This act empowered the defendants to construct a railroad from the Iowa line to Lake Superior, and granted all the land to said company belonging to, or which might thereafter belong to, the territory, two hundred feet in width along the railroad; and for the purposes of aiding the company in building the road, &c., it further enacted, that any lands that might be granted to the territory in aid of the construction of said railroad should be, and the same were thereby *granted in fee simple absolute, without any further act or deed;* and the governor of the territory, or

future State, of Minnesota, was authorized and directed in the name, &c., of said Territory or State, after the grant should be made by the United States to said territory, to execute and deliver to the said company the proper transfer of such property as the company might require, to vest in them a perfect title, with the condition that such lands should be taken upon the terms and conditions that might be prescribed in the act of Congress granting the same.

It was alleged in the answer that the conditions of the charter, to be performed by the company previous to the passage of the act of Congress granting the land, were all performed.

That on the 29th June, 1854, an act was passed by Congress granting to said territory, for aiding in the construction of a railroad along the line mentioned in the charter, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road within the territory. That on the 30th of June, 1854, subscriptions were made upon the books to the amount of a million of dollars, the amount required to be subscribed prior to the election of directors; directors were elected, and the organization completed by the election of a president; and that, on the first day of July, 1854, such directors and president entered upon the discharge of their duties.

Such answer further recited an act of the legislature of Minnesota, passed the 17th February, 1855, amending the charter of the company, and declaring the act entitled "An Act to incorporate the Minnesota and Northwestern Railroad Company" re-enacted, subject to the amendments and provisions therein contained. (Record, pp. 16, 17, 18.)

That on the 20th October, 1855, and while the land in question was the property of the United States, subject to the act of 29th June, 1854, of Congress, the company surveyed and located the road so as to conform to the act of Congress 29th June, 1854, and the said acts of the legislature. That the route of the road was laid over and across the land upon which the trespass is alleged to have been committed, and that section fifteen, the *locus in quo*, was one of the sections granted by Congress to the territory. That the plaintiff did not purchase the land until the 1st January, 1856, and that his whole interest was derived from

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such purchase, and that on the 25th October, 1856, and subsequently, the defendants, upon the land, and on that part, and no other, over which the railroad is located, within the proper width of the track, did the acts complained of, the same being incident and necessary to the construction of the road.

The plaintiff replied, that after the officers, &c., entered upon their duties as alleged in the answer, and before the trespasses, or either of them, and on the 4th day of August, 1854, an act was passed by Congress, and duly approved by the President, by which it was enacted, that the bill entitled "An Act to aid the Territory of Minnesota in the construction of a railroad therein," which passed the 20th, and was approved the 29th of June, 1854, be, and the same is hereby, repealed.

To this reply the defendants demurred, alleging that said repealing act was void and of no effect.

Plaintiff's Points.

First.—No title to the lands granted by Congress vested in the Territory of Minnesota.

Second.—The Minnesota and Northwestern Railroad Company acquired no rights under their alleged act of incorporation and the act of Congress.

Third.—Congress could resume its grant, and the repealing act was valid and effectual, and—

I. In respect to the territories, Congress exercises over

them supreme power of sovereignty; exclusive and unlimited legislation is given to Congress.

1st Kent's Com., 422.

Territories have no sovereignty, and are within the power and jurisdiction of the United States. (1 Peters' R., 511 to 543; 3d Vol. Story Con., §§ 1316, 1319, 1320, 1324) They have no powers but those specially granted to them. They are not persons, either natural or artificial; and so not being, are not capable of taking grants, holding lands, &c. (Bac. Abr., vol. 4, p. 508.) No power is given by Congress for Minnesota to hold lands, and were Congress to grant lands to a territory, it would only be a grant to itself.

No estate passed, because, by the act, "no title shall vest in said territory, nor any patent issue for any part of the land, until twenty continuous miles of road are built," &c.

The word *grant* does not imply a warranty.

2 Greenleaf's Cruise, 735, 2d ed.

This was a grant, without covenants, of an estate to take effect *in futuro*, upon the happening of a condition, &c. A grant upon condition of the performance of certain conditions, even for the payment of money, is not valid. (Jackson *vs.* Delancy, 4 Cowen, 427.) There was no consideration from the territory, and therefore void.

Jackson *vs.* Florence, 16 J. R., 47.

We say, then, no title vested, because—

1st. The territory belongs to the United States, and its government is a mere creature of Congress, and the grant would only be a grant to itself.

2d. The territory has no individuality; is incapable of taking a grant, or being a party to a contract.

3d. The grant is of an estate to take effect in the future, not supported by a lesser estate, and therefore inoperative.

4th. The grant was without a present passing considera-

tion, and therefore ineffectual to vest any estate in the territory.

II. The Minnesota and Northwestern Railroad Company acquired no rights under the act of incorporation and the act of Congress:

1st. Because the territorial act of incorporation was void. The power of creating corporations is not within the general powers granted to territories; or, at best, this is a doubtful and open question.

This act of incorporation is void also, because it interferes with the primary disposal of the soil, and is in conflict with the organic act, and the laws of Congress. (Section 7, act of incorporation.) The 8th section of act of incorporation "grants this land in fee simple absolute, without further act or deed." This act of incorporation was months before the act of Congress making the grant, and is an act forestalling and directing the act of Congress in the dispositions of the public lands.

2d. The company acquired no right to the land, because the territory, when it assumed to grant to the company "in fee simple," had nothing to grant. It was neither a conveyance, nor yet an agreement to convey. The act was therefore void. "If the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee."

Bac. Abridg., title Grant, p. 514.
2d Humphrey, 19.
4 Cowen, 427.
16 J. R., 47.
4 Mass. R., 688.
4 Cruise Digest, 52, 2d ed.

The grant therefore was inoperative in its inception, and passed no estate to the company.

The grant being without covenants, any estate subsequently acquired by the territory cannot be divested except by a new grant, upon new considerations.

Even if the estate was in the territory at the time of the grant to the company, (but it was not,) the territory had no power to dispose of it, and the act would be void for that reason.

8 Bac. Abr., 142.
Wilcox *vs.* Jackson, 13 Peters, 490.

"If the State had no title to the thing granted, or if the officer had no authority to make the grant, it is void."
Ibid.

3d. Although the words "hereby granted" are used, the estate granted is to vest *in futuro*, and upon the happening of various contingencies, and for that reason was inoperative to vest any estate.

"A deed of a freehold to commence *in futuro* is void, unless supported by a less estate.

4 Bac. Abr., 204.
Jackson *vs.* Florence, 16 J. R., 47.
Jackson *vs.* Delancy, 4 Cow., 427.

The estate was also granted, not simply to vest in the future, but upon conditions *to be performed* in the future, was without a valuable consideration, and immaterial.

This branch of the case is fully stated and determined in Jackson *vs.* Delancy, 4 Cow., 427, above cited.

See also 7 Mass., 380.

A mere possibility cannot be granted.

13 Wendel, 178.
4 Bac. Abr., 515.

There was no valuable consideration. As in the case cited, there was a stipulation in the conveyance that the grantee should pay a certain sum, which he did pay; so here, it is claimed that money has been expended in the organization of the company; but such was held not to be such a consideration as would support the conveyance.

Vide Ibidem.

There was no mutuality, because, although the company

formally accepted the charter, the corpor
be compelled to build the road. Neglect
chise, or failure to accomplish the purpo
would simply work a forfeiture.

2 Bac. Abr., 482.

It is claimed by the defendants, that t
has been abrogated by this act of incorporation, and that the law of the case is furnished by the act. We think not. If the act does abrogate the common law, it must be by implication. The act is silent upon that subject.

8 Coke, 118 et al.
Organic Act, § 12.

Nothing can be implied.

4 Mass., 471; 9 Pick., 496.
15 Mass., 205; 13 Pick., 284.
4 Hill, 76; 4 John., 92.

"An affirmative statute does not take away the common law."

9 Bac. Abr., 534–'5.
Salters *vs.* Tobias, 3 Paige, 338.
Jackson *vs.* Brott, 3d Cains, 160.

Unless an intention to repeal the common law is manifest, it cannot be inferred.

Jennings *vs.* Commonwealth, 17 Pick., 80.

The following cases are also cited as to this branch:

Danforth *vs.* Wear, 9 Wheat., 673.
Patterson *vs.* Jenks et al., 2 Peters, 216.
United States *vs.* Bradley, 10 Peters, 344.

I am, therefore, satisfied that no interest whatever in lands, present or contingent, vested or could vest in the defendants under the acts of 4th March and 29th June, 1854.

4th. No indefeasible rights vested or could vest in the company by the act of 4th March, 1854. The 6th section

Even if the estate was in the territory at the time of the grant to the company, (but it was not,) the territory had no power to dispose of it, and the act would be void for that reason.

8 Bac. Abr., 142.
Wilcox *vs.* Jackson, 13 Peters, 490.

"If the State had no title to the thing granted, or if the officer had no authority to make the grant, it is void."
Ibid.

3d. Although the words "hereby granted" are used, the estate granted is to vest *in futuro*, and upon the happening of various contingencies, and for that reason was inoperative to vest any estate.

"A deed of a freehold to commence *in futuro* is void, unless supported by a less estate.

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There was no valuable consideration. As in the case cited, there was a stipulation in the conveyance that the grantee should pay a certain sum, which he did pay; so here, it is claimed that money has been expended in the organization of the company; but such was held not to be such a consideration as would support the conveyance.

Vide Ibidem.

There was no mutuality, because, although the company

formally accepted the charter, the corporation could not be compelled to build the road. Neglect to use its franchise, or failure to accomplish the purpose of its charter, would simply work a forfeiture.

2 Bac. Abr., 482.

It is claimed by the defendants, that the common law has been abrogated by this act of incorporation, and that the law of the case is furnished by the act. We think not. If the act does abrogate the common law, it must be by implication. The act is silent upon that subject.

8 Coke, 118 et al.
Organic Act, § 12.

Nothing can be implied.

4 Mass., 471; 9 Pick., 496.
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Danforth *vs.* Wear, 9 Wheat., 673.
Patterson *vs.* Jenks et al., 2 Peters, 216.
United States *vs.* Bradley, 10 Peters, 344.

I am, therefore, satisfied that no interest whatever in lands, present or contingent, vested or could vest in the defendants under the acts of 4th March and 28th June, 1854.

4th. No indefeasible rights vested or could vest in the company by the act of 4th March, 1854. The 6th section

The company act at their peril all the time, and must rely simply upon the good faith of the Government, with full knowledge of the hazard. There is nothing in the Constitution which prohibits Congress from passing laws impairing the obligation of contracts.

Evans *vs.* Peters, C. C. R., 322.

It may, perhaps, be objected, that the company could not take by this grant, because disqualified by the terms of section 3 of the act, which says that the lands shall not inure to the benefit of any company heretofore "*constituted and organized.*" *But I do not make this point. The company was* CONSTITUTED *by its act of incorporation.* It had various things to do and perform before it would become *organized;* and it appears from the record that all of these prerequisites were not accomplished until after the 29th June, 1854. Had the act of 29th June, 1824, stopped at *constituted*, the prohibition would have been unquestionable. As it is, there is no ambiguity upon its face, and its intent and meaning are manifest.

There is another objection, which should have been properly mentioned before.

The legal effect of the act of Congress, construed as the defendants would have it, is to vest in the territory a fee in the lands granted for the use of the company; the territory, of course, being incapable of taking a grant, except as a corporation; and it is a well settled rule of the common law, that a corporation cannot be seized of lands for the use of another.

4 Bac. Abr., 449.
Hill on Trustees, 48, 52.

The rule that grants shall be construed most strictly against the grantor, does not apply to governments.

Chitty on Prerog., 16, sec. 2.
3 Peters, 289.
4 Peters, 165, 514.
8 Peters, 738.

III. The third proposition follows as a corollary from the

two first. Legislatures have a right to take away by statute what was given by statute, not divesting vested rights.

Oriental Bank *vs.* Freese, 6 Shep., 109.
People *vs.* Livingston, 6 Wend., 531.

The acts of Congress not inconsistent with the Constitution of the United States, are the *supreme law of the land.* Like the acts of the Parliament of England, they are the exercise of the highest power on earth, and no power but Congress can undo what they have done. Supposing that after Congress had made this grant, instead of repealing the act by which it was made, it had repealed the organic act by which Minnesota was constituted a territory, what would have become of the grant? Could it be said that Congress, having once parted with these lands, would not, after such repeal, be possessed of them as before the grant? Undoubtedly not. The repeal of the organic act would have been but a resumption of lands which it had conditionally intrusted to a creature of its own creation, and whose political existence it could annihilate by the simple enactment of a law. No one will deny its power to repeal the organic act, nor the consequences as to this grant which would flow from such repeal.

Has not Congress the same power to resume this grant by a direct repeal of the law which made the grant, as by a repeal of the organic act? The answer is obvious.

It has been urged by the defendants that the rules of the common law do not apply to this case. I am aware that it has been held, that "there is no unwritten or common law of the Union" (2 McLean's R., 572); and this is undoubtedly correct, but that does not affect or reach this case. In United States *vs.* Coolidge, (1 Gall., 488,) Mr. Justice Story held, that in reference to the Courts of the United States, when once an authority is lawfully given, the nature and extent of that authority, and the mode in which it shall be exercised, must be regulated by the rules of the common law. He further says, that the Constitution and laws of the United States are predicated upon the existence of the common law, and that the *existence* of the common law is

not only supposed by the Constitution, but is appealed to for the construction and interpretation of its powers.

Chancellor Kent, in Lecture XVI., vol. 1, of his Com's, assumes that it applies to the federal Courts except in criminal cases; and he say that, "without such a guide, the Courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations." The common law came to North America with the Anglo-Saxon colonists, and where their descendants are, there is, and there will be, the common law. It must accompany Anglo-Saxon enterprise, and go hand in hand with those wonderful characteristics which are making, and will make, the descendants of the first colonists the dominant race upon this continent. It is recognized by this Court in every decision which it makes, and is as essentially interwoven with our social and political system as the love of personal liberty with our natures. It prevails alike from Maine to California, and the rights, interests, and liberties of the people of Minnesota, are even now adjudged, determined, and protected by its benign and wise rules and principles, and no doubt can exist that the rules of the common law are as applicable to the case under consideration as if it had arisen in New York, where the common law is known to prevail in *proprio vigore*. (*Vide Org. act Minnesota*, § 12.)

I have attempted to show that no right to the lands mentioned in the grant vested in the territory or company. That the company was a stranger to the grant, and Congress has simply resumed its grant without divesting any *vested* estate; that, admitting it to have been a simple contract to convey, no title having vested, Congress has the power to repudiate the contract under the Constitution; and admitting that corporate franchises are property, which is denied (vide Arthur *vs.* Commercial and Railroad Bank, 9 S. and M., 394, *et ubique*), that Congress has not assumed to, and has not divested the company of its franchises, the lands being collateral thereto, and purely within the disposal of Congress, Congress has simply exercised its rightful powers under the Constitution to control and dispose of the public lands; that, too, before any individual interest

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therein had grown, and to disenthral the public domain from the effects of hasty and inconsiderate legislation from a body of its own creation, and entirely unauthorized in the premises.

H. L. Stevens

Of Counsel for Plaintiff.

Wm. C. Bryant & Co., Printers, 41 Nassau street, cor. Liberty.

Supreme Court of the United States.

The Minnesota and Northwestern Railroad Company, Defendants in Error, *ads.* Edmund Rice, Plaintiff in Error.	No. 96. December Term, 1862.

Points for Defendants in Error.

I.—Every legally organized body vested with powers of general or municipal government, is a corporation or artificial person; capable, unless restricted by its organic law, of holding and conveying real estate, for all the purposes for which it was created.

1 *Black Com.*, 37.
A. & Ames on Cor., 5th Ed., p. 3, §§ 4, 6, 7, 14, 15, 16, 18, 22.
U. S. v. *Admr. of Hillyer*, 3 *Wash. C. C.*, 73.
King of Spain v. *Hallett*, 2 *Bligh N. S.*, 31.
King of Two Sicilies v. *Wilcox*, 14 *Jurist.*, 163, 171.
" 15 *Id.*, 214.
" 2 *Eng. L. & Eq.*, 122.
2 *Kent*, 270, 274.
8 *Howell's State Trials*, 1162.
1 *Inst.*, 250.
1 *Kemble's Saxons in England*, 74.
Con. U. S., Art. 1, § 8.

II.—It follows as a necessary legal consequence that the United States, (by the agency of an act of Congress,) as grantors, could convey or grant the lands in question, being competent grantors of their own property.

III.—The Territory of Minnesota was a competent grantee of the lands; being a political person or corporation, entitled to take and hold real estate for purposes connected with its governmental duties, to the extent which the grantors saw fit to convey or grant it.

9 *Stat. at L.*, 403, *Act of March* 3, 1849, §§ 6, 9, 13, 17, 18.

Terret v. *Taylor*, 9 *Cranch*, 43, 49, 52.

22 Ark. 414

IV.—Independently of these positions, Congress, possessing the supreme legislative power in the Union, and over the Territory, had power to make a competent grantee, by the creation of an artificial person, or corporation, or a *quasi* corporation, and endow it with capacity to take, hold, and convey the lands in question, and did so by the act of 29th June, 1854.

Am. Ins. Co. v. *Center*, 1 *Peters R.*, 511, 542, 546.

Brief, *p.* 11, *at bottom and top of p.* 12.

Ark.

Jackson v. *Goodell*, 20 *John R.*, 693, 707.

3*d Story's Com. Con. U. S.*, §§ 1319, 1320.

12 How 59

V.—So, the power of Congress being supreme as maker of the law under which, and by virtue of which, the grantees of the United States take, it makes the law for each particular case in which a grant is made; so that the act itself confers upon the grantee the right

and capacity to take, and to hold and convey, in the mode which it prescribes.

Brief, p. 7.

VI.—The act of Congress of 29th June, 1854, (*Record, p.* 15,) was a grant by the United to the Territory, then in actual existence, conveying the lands upon the terms and for the purposes prescribed in it.

Brief, pp. 5, 8.
Wilcox v. *Jackson*, 13 *Peters*, 490, 516.
Polk's Lessee v. *Wendell*, 5 *Wheat.*, 293.
Leissure v. *Price*, 12 *Howard U. S. R.*, 59, 75, 76.

VII.—At any rate it granted an easement; a right to go upon the lands, and make and work upon the railroad until it should be completed; and so granted an *irrevocable license* for that purpose, quite sufficient to protect the defendants in error from being treated as trespassers.

Brief, p. 8.

VIII.—Viewed in either aspect, as a grant or a license to enter, (certainly in the former) creating an interest and title, the Act of Congress was irrepealable, and the repealing Act was void.

Brief, pp. 16, 17, 18, *and the cases there cited.*
Town of Pawlet v. *Clark*, 9 *Cranch*, 332, 336.
Ferret v. *Taylor*, *Id.*, 43, 49, 52.

Gregory's Executors v. *Shelby College*, 2 *Metcalf's Ken. R.*, 589.
2 *Black. Com.*, 346, 348.
1 *McQueen's House of Lords Cases*, 595, *note.*

IX.—The lands having vested in the Territory, Congress had no right to grant them to any one else; and as the plaintiff in error could not obtain a title except under a subsequent grant of some kind or an entry, he had no title or possession sufficient to maintain a trespass.

X.—The defendants in error under the Acts of the Territorial Legislature of Minnesota, acquired a right to enter and survey the lands in order to locate the railroad, and to comply with the conditions imposed by the grant so as to finish and operate the road as required; of course an action of trespass would not lie for so doing.

Brief, *pp.* 14, 15, 16.
Sess. Laws of Minnesota, 1853, *pp.* 129, 159, *as to other railroads.*
Jefferson Co. Bk. v. *Wood*, 9 *Cowen*, 194, 205.

The judgment of the Court below should be affirmed.

Wm. Curtis Noyes,
Of Counsel for Defts. in Error.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty.

U. S. SUPREME COURT.

Edmund Rice,
Plff. in Error,
vs.
The Minnesota and North-Western Railroad Company,
Defts. in Error.

No 96
Dec.r term
1861

CASE.

This is a writ of error to the Supreme Court of the Territory of Minnesota.

An action of trespass was brought by the plaintiff, Rice, before one of the District Courts in the Territory, for a trespass alleged to have been committed by the defendants upon certain quarter sections of land alleged in the complaint to belong to the plaintiff.

Pleadings and Proceedings.

The complaint sets forth the facts constituting the alleged trespass. (*Case*, *pp.* 2, 3.)

The answer sets out the facts hereinafter stated, with the exception of the passage of the repealing act of August 4th, 1854. (*Ib.*, *pp.* 3 *to* 22.)

The replication avers the passage of the act of August 4, 1854. (*Ib.*, *pp.* 22–3.)

The defendants demurred to the replication, upon the ground that the act of August 4 was void in so far as it related to the repeal of the granting act. (*Case*, *p.* 23.)

The demurrer was overruled by the District Court, and judgment thereupon was rendered for the plaintiff. (*Ib.*, *pp.* 23–4.)

From that judgment the defendants appealed to the Supreme Court of the United States for the Territory, where the judgment of the District Court was reversed. (*Ib.*, *pp.* 24 *to* 27.)

The cause was thereupon brought before this Court by the plaintiff, by writ of error. (*Ib.*, *pp.* 1, 28.)

The FACTS *established by the pleadings are as follows:*

On the 4th of March, 1854, an act was passed by the Legislature of the Territory of Minnesota, incorporating the defendants, and empowering them to survey, locate and construct a railroad from the Iowa line to Lake Superior, and granting to the said company all the land belonging, or which might thereafter belong, to the Territory, two hundred feet in width along the line of the railroad, and further declaring, that "for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted, that any lands that may be granted to the said Territory to aid in the construction of the said railroad, shall be, and the same are hereby *granted in fee simple, absolute, without any further act or deed;* and the Governor of this Territory or future State of Minnesota is hereby authorized and directed, in the name and in behalf of said Territory or State, after the said grant of land shall have been made by the United States to said Territory, to execute and deliver to said company such further deed or assurance of the transfer of the said property as said company may require to vest in them a perfect title to the

same ; provided, however, that such lands shall be taken upon such terms and conditions as may be prescribed by the act of Congress granting the same." (*Case, p.* 7.)

Provision was also made in the act for opening of subscription books and for the organization of the company, which organization was to be perfected by the election of a president on or before the first day of July then next. (*Case, pp.* 4, 5, 12, §§ 3, 4, 16.)

The conditions of the charter to be performed by the railroad company previous to the passage of the act next mentioned, were all performed by the company. (*Case, pp.* 13, 14.)

On the 29th of June, 1854, an act was passed by Congress, granting to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad along the route mentioned in the charter, every alternate section of land, designated by odd numbers, for six sections in width, on each side of said road, within the Territory. (*Case, pp.* 14, 15.)

After the passage of the act last mentioned, and on the 30th of June, 1854, stock subscriptions were made upon the books of the company to the amount of one million of dollars, being the amonnt required by the charter to be subscribed prior to the election of directors ; and, on the 30th, directors were elected, and the organization of the company completed by the election of a president. (*Case, pp.* 15, 16.)

On the fourth of August, 1854, another act was passed by Congress, the 2d section of which reads as follows :

"§ 2. And be it further enacted, that the *bill* entitled 'An Act to aid the Territory of Minnesota in the construction of a railroad therein,' which passed the House of Representatives on the 20th of June, 1854, and which was approved by the President of the United States on the 29th of June, 1854, be, and the same is hereby repealed." (*Case, p.* 23.)

On the 17th of February, 1855, an act was passed by the Legislature of Minnesota amending the charter of the company, and declaring that the act entitled "An Act to incorporate The Minnesota and Northwestern Railroad Company, is hereby re-enacted, subject to the amendments and provisions herein contained." (*Case, pp.* 16, 17, 18.)

On the 20th of October, 1855, and while the lands (which is the *locus in quo*) in this case were the property of the United States, subject to the conditions of the Act of June 29th, 1854, the company caused a survey to be made of the route of the railroad, and located the same so as to conform, in all respects, to the route designated in the Act of Congress of June 29th, and the said acts of the Legislature. (*Case, p.* 21.)

The location was so made upon the route that the railroad was located upon, over and across the land upon which the complaint alleges the trespass to have been committed; and section fifteen, mentioned in the complaint as a *locus in quo*, is a section designated by an odd number, and was one of the sections so granted to the territory by the said act of Congress. (*Case, p.* 21.)

The land was not purchased nor entered by the plaintiff until January 1, 1856, and his whole interest in the premises is derived from such purchase and entry. (*Case, pp.* 21, 22.)

On the 25th of October, 1856, and subsequent thereto, the defendants went upon that part of the land mentioned in the complaint, upon and over which the railroad was located, and upon no other part of the land, and then and there, within the proper and necessary width of the track of said railroad, cut down, &c., the trees mentioned in the complaint; such cutting down, &c., being incident and necessary to the construction of the road; which is the alleged trespass complained of.

Defendants' Points.

I.

The Act of Congress of June 29, 1854, contains, and is *per se*, a grant, *in presenti*, to the territory of Minnesota, of all the lands belonging to the Government, designated by odd numbers, within six miles of the railroad contemplated by the act, and also of an easement or right to construct and operate a railroad over all the other public lands upon the route, as well as of all the franchises necessary to enable the territory to build and operate such road.

1. A present right, estate and interest in the lands, is expressly granted by the terms of the act.

In *Lessieur* v. *Price*, (12 *How. R.*, 59,) there was a grant by Congress of four sections to the State of Missouri, to be located by the Legislature.

The Court say: "It was a *present grant.* The act *vested* a title to four sections in the State of Missouri, and the selection and location gave precision to the title, and attached to the particular land selected."

(a.) By the terms of the Act of Congress, the land "*is hereby granted* to the Territory of Minnesota," to be "*held* by the territory," for the specified purpose. Again: "The lands *hereby granted* shall be exclusively applied to the construction of the road," &c. The lands *hereby granted* to the said territory shall be *subject to the disposal* of any Legislature thereof, (§ 3); and in a specified event, the lands *unsold* shall *revert* to the United States.

Reversion, (*reversio* from *revertor*,) signifies returning again.

Jac. Law Dict'y.

A reversion has two significations; the one is an *estate left* which *continues* during a *particular estate*

in being; and the other is the *returning* of the land after the *particular estate* is ended.

Ib., Tit. Reversion.

If no *estate* passed to the territory, there was nothing to *revert.*

The *unsold land* was to revert.

This language cannot be construed to mean anything less than a grant of a present interest or estate in the lands.

It is true, the fourth section provides that "the "lands *hereby granted* to said territory *shall be dis-* "*posed of* by said territory, only in manner follow- "ing, that is to say, *no title shall vest* in the said "Territory of Minnesota, *nor shall any patent issue*" until the specified condition is performed. But this does not annul the grant of a present interest, nor was it intended to work any such consequence. It merely so qualifies *the power of disposal* that the territory cannot place the title beyond the operation of the condition which may divest the territory of the estate and *revest* the same in the United States. It would be doing great injustice to Congress to make it say, at the same moment, the lands are hereby granted, but no title shall pass. The withholding of the patent was only withholding the evidence of title, and not the title itself.

A grant by Congress is a higher evidence of title than a patent; the former being the act of the government itself, while the latter is only that of its ministerial officers.

Grignon v. *Astor*, 2 *How. R.*, 319, (344.)

A grant from the government is equivalent to a conveyance with *livery of seizin.*

Enfield v. *Day*, 11 *N. H. Rep.*, 520.

Enfield v. *Permit*, 5 Id., 280.

"With the exception of a few cases, nothing but a patent passes a perfect and consummate title. One class of cases to be excepted is, where an act of

Congress grants land, as is sometimes done, *in words of present grant.*"

Wilcox v. *Jackson*, 13 *Peters*, 498, (516.)

Taking the different provisions of the act together, and applying to them the rules which govern the construction of conveyances of real property, the case amounts to this: There is a grant of the land, vesting a *present* interest or estate in the grantee, but which interest or estate is subject to be divested upon a condition subsequent. This construction harmonizes all the words of the grant, and gives full effect to the manifest intention of the parties.

The question, however, as to whether the act of Congress creates a fee, defeasible upon the failure to construct the road within the time limited, or a fee conditional upon such construction during such period, is not important; for in either case, an estate, property and interest in the lands, is vested in the territory by the terms of the grant, as well as from the evident design and intention of Congress found in the act, to wit: *First*—That the road should be constructed; and, *Secondly*—That the lands in question should be appropriated *in aid* of such construction.

"The *intention* of Congress, as explained by the act, overrules all technicalities. The validity of a legislative act depends, in no degree, upon its containing the usual technical terms."

Rutherford v. *Greene*, 2 *Wheat.*, 198.

(b.) These remarks are based upon what we conceive to be the plain and obvious intention of the act as explained by itself. But, if there is any doubt as to the proper construction of the grant, because of apparent contradictions in its terms, then, we say, the act must be construed most strongly against the grantor.

For, although a different rule usually obtains in regard to the construction of the King's naked

grants *ex gratia*, from what governs in the case of grants by individuals, yet, where there is a consideration reserved by the crown, or conditioned in the grant, and forming a part of the *res gestæ*, then the rule that grants are to be construed most favorably for the grantee, prevails.

Chitty on Prerog, *ch.* 16, § 5.
Lord Raym., 32.
Bacon's Abr. Prerog., *F.* 2.
17 *Viner*, 152, *Prerog. M. C. R.*, 11.
6 *Inst.*, 446–7.
6 *Coke R.*, *Mollyn's Case*, 5.
10 *Coke R.*, 65, *Whistler's Case.*

There is another rule touching the construction of grants, which is—where a particular certainty precedes, it shall not be destroyed by an uncertainty or mistake, coming after in the same instrument.

Bac. Abr., *Tit. Prerog.*
Construction of Grants.

And in this case the grant is contained in the first section of the act, and is, upon its face, absolute and certain, and is only rendered doubtful, if at all, by the provision in § 4, touching the manner in which the lands are to be *disposed of* by the territory.

2. An easement, consisting of a right to construct and operate a railroad upon and over any of the lands of the United States, along the line of the railroad to be located, was also granted by the act of Congress; as well as every *franchise* within the power of Congress to grant, and *necessary* to effect the object contemplated.

(a.) The general rule is that all grants must be construed so as to effect the intention of the grantor. So, too, a legislative act is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule as to the con-

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struction or force of particular terms, must yield to the clear expression of the paramount will of the Legislature.

Wilkinson v. *Leland*, 2 *Peters*, 627.
Rutherford v. *Greene*, 2 *Wheat.*, 198.

In this case it is clear Congress intended that the road should be built, and that, too, over the even sections, which were not granted by the act, lying along the route. They, therefore, must have designed, by the act, to grant to the territory a right of way over such sections, from the necessity of the case, in order to accomplish the particular object of the act; for the road could not lawfully be constructed over such sections belonging to the government, unless permission to do so was given in the act, by necessary implication or otherwise, inasmuch as the territorial legislature is prohibited from interfering with the disposition of the public lands, and could not permit them to be taken for a railroad, and there is no way, outside of an act of Congress, which would enable the territory or its grantees to appropriate the lands for that purpose.

It is sufficient to say that the road could not be built, and, therefore, the design of Congress as expressly declared in the act would be defeated, and the grant rendered utterly valueless, unless a grant of the right of way is to be implied from the act.

This being so, the rule laid down by Justice Story in the *Charles River Bridge Case*, 11 *Peters*, 592, applies here: "It is a principle of common sense, "as well as of law, that when a thing is granted, "whatever is necessary to its enjoyment is granted "also. It shall not be presumed that the king means "to make a void grant."

Or, as is said in *Whistler's Case*, 10 *Coke*, 65: "Such construction as will make the true *intention* "of the king, as expressed in his charter, take effect, "is for the king's honor, and stands with the rule of "law; and, therefore, this word (appertaining) shall

"in such case, in the *king's* grant, be taken out of "the proper signification."

Gayety v. *Bethune*, 14 *Mass. R.*, 56.
Com. Dig. Grant, E. 11, *Ib. G.*, 12.
Co. Litt., 56, *a.*
Bac. Abr. Prerog. F. 2, *p.* 602.
17 *Vin.*, 153, *Title Prerog. O. C. Pl.*, 1.
Id. Pl., 4.
Id. Pl., 13.
Lord Chandos' Case, 6 *Co. R.*, 55.
Atkyn's Case, 1 *Vent.*, 399, 409.
Moleyn's Case, 6 *Coke R.*, 6.
Finch's Law, 100.
Saunder's Case, 5 *Co. R.*, 12.
Plowden, 317.
Darcy v. *Askwith*, *Hobart's R.*, 234.
Lyford's Case, 11, *Coke R.*, 52.
Bac. Abr. Incidents.
Pl. 8, *and Nusans Pl.*, 14.
Allen's Case, *Owen*, 113.
10 *Co. R.*, 67, 6.
Chitty Prerog., ch. 16, § 5; *Lord Raym.*, 32.

These rules apply with still greater force when we consider that the grant in this case was founded upon a *valuable consideration*, to wit: The carrying of the United States mails for such price as should be fixed by Congress, and of their troops and property, without toll or charge, &c.; for "when king's "grants are upon a valuable consideration, they shall "be construed favorably for the patentee, for the "honor of the king."

Bac. Abr. Prerog., Construction of Grants, 5, and authorities there cited.

Aside from the general intention of Congress to authorize the building of the road over the government lands, their particular design to grant the right

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of way is also to be deduced from the actual grant of such right over reserved lands.

This part of the case, however, is in a nutshell. All the lands along the route, nearly, belonged to the government. Congress, by the act of June, authorized the territory to build the road over the route, and of course over the government lands; for it could not be built without crossing them. This, of itself, is a grant of the right of way.

3. Congress had power to make this grant to the territory, and the territory had power to take it.

(a.) Subject to the restrictions of the Constitution, the power of Congress over the territories is absolute. It had power to make the grant, and, if necessary, to create the territory a corporation to receive it; and if it is necessary so to construe the act in order to effectuate the intention of Congress, then the Court will hold that, by the act, a corporation was created for the purposes of the act.

(b.) But it is not necessary. Grants of lands have been made by Congress to every territory for various purposes, ever since their first organization, and the power of the territories to take such grants has never been questioned. Seventy-two sections were, long since, granted to the territory of Minnesota to establish a university. Can any one doubt the right of the territory to sustain an action of trespass for injuries to these lands? Or that a perfect title would pass to the grantee of the territory? Or that the general government has not, by its grant, divested itself of its entire estate in and control over them?

A grant by the sovereign authority to a county or hundred (not a corporation) creates them, for that single purpose, a corporation, and confers upon them authority to take and hold the lands in corporate character, without saying to them or their successors.

Ang. & Ames on Corp., 87.
2 *Kent Com.*, 275.
Hempstead v. *Hempstead*, 2 *Wend. R.*, 109.
Soc. Prop. Gospel v. *Pawlet*, 4 *Peters' R.*, 480.
Pawlet v. *Clark*, 9 *Cranch R.*, 292.

Even a grant by Congress to a State not yet in being, and which cannot take effect until the State is admitted, has been held to pass a present estate.
Lesseiur v. *Price*, 12 *How. R.*, 59.

Such grants have been made to Michigan and other States.

II.

The act of the Territorial Legislature of March 4, 1854, (Act of Incorporation,) contained and was a valid grant to the defendants of all the lands to be granted to the territory by Congress; and that act of the Legislature took effect as a grant, so as to vest the title in the company the moment the grant was made by Congress.

1. It is true it is a rule of the common law that grants of property, of which the title is not in the grantor when such grants are made, are void; but that rule is not applicable to this case.

(a.) There is no principle of the common law which pervades the Union and exists, independently of the laws of the States.
2 *McLean's C. C. R.*, 568.

The common law is not in force in the United States as a federal government. In some of the States that law has been adopted by their constitutions, subject, however, to legislative control; in

others it has been enacted by their legislatures, and is, of course, liable to be changed by the same authority.

Dawson v. *Shaw*, 1 *Black.*, 206.

It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States; each of which may have its local usages, customs, and common law. The common law could be made a part of our federal system *only* by legislative adoption.

Wheaton v. *Peters*, 8 *Peters' R.*, 658.

There is no act of Congress nor of the territorial legislature adopting the rules of the common law.

(b.) Conceding, however, that the general rule prevails in Minnesota, still such rule is not applicable to this case.

For here, by the Organic Act, the legislative power and authority of the territory has been wholly vested in the governor and legislative assembly by Congress (§ 4); and that power extends to all rightful subjects of legislation consistent with the Constitution of the United States, and the provisions of such act. (§ 6.)

Statutes of Min., p. 24.

The Legislature, therefore, being the supreme law-making power, had the ability to abrogate the rule referred to, either generally or in this particular case; and by making the grant, and declaring that the same should have full force so as to vest the fee simple absolutely in the grantee without any further act or deed, such legislature did abrogate and annul the rule of the common law by the paramount authority and force of the statute.

The Government of the Territory had power by its legislative act, to grant or enter into a covenant to grant land subsequently to be acquired, so as to

give the grantee a vested interest therein the moment the territory should acquire its interests; and *that* the territorial government did by the act in question.

2. The Legislature of Minnesota had power to make the grant to the company.

(a.) The Organic Act declares, "that the legislative "power of the territory shall extend to all rightful "subjects of legislation consistent with the Consti- "tution of the United States, and the provisions of "such Organic Act," and the subject legislated upon was a rightful and proper subject of legislation.

(b.) The Act of congress, of June 29th, granting the lands, expressly confers upon the legislature the power to dispose of them.

(c.) No authority from congress was necessary. The territory being vested by the congressional granting act with an estate and property in the lands, had power to dispose of its interests.

3. The Railroad Company had fully complied with all the conditions of its charter at the time the Granting Act was framed by congress, but was not yet organized. It was, therefore, in a condition to take the grant, within the provisions of its charter, and the act of June 29th, 1854.

(a.) By the charter, the corporators named in the act were to meet in New York, on the first Tuesday in April, accept the charter, give notice of such acceptance, and make arrangements for future meetings, the organization of the company, and the issue of capital stock. Within sixty days after such acceptance, subscription books were to be opened, upon twenty days' previous notice.

Case, p. 4, §§ 2 and 3.

And all this was done within the time prescribed by the charter.

Case, p. 13.

(b.) At the time of the passage of the Act of June 29th, the company was not organized.

(1.) Nothing had been done beyond the accepting of the charter, and opening books of subscription, &c., as above stated.

Only two hundred dollars had been subscribed to the capital stock, and no directors, president or officers had been elected.

(2.) By the charter, the Directors, within ten days after their election, were to *organize* by the election of a president, &c.; and until such *organization*, the corporate powers were to remain in the corporators named in the act.

Case, p. 5, § 3.

And this organization was to be completed on or before the first of July, 1854.

Case, p. 12, § 16.

(3.) It was not until after the passage of the act of Congress, and on the 30th of June, 1854, that the million of dollars required by the charter was subscribed, nor were the directors or president elected until the first of July.

Case, pp. 15 and 16.

4. Upon the passage of the act of June 29th, therefore, the company became and was seized, *ipso facto*, of all the estate and interest in the lands granted by that act to the territory.

III.

If it shall be held that the act of June 29th, required a *subsequent act* of the Territorial Legislature to dispose of the lands, then we say :—

1. The estate and interest granted to the territory remained vested in the territory, notwithstanding the passage of the repealing act, until the 17th of February, 1855.

2. On the 17th of February, 1855, and prior to the alleged purchase of the land by the plaintiff, or the cause of action in this case, the territorial legislature passed another act re-enacting the charter, with certain amendements, whereby the land was again granted to and vested in the company.

Case, pp. 16, 17, 18.

IV.

The second section of the act of Congress, of August 4th, 1854, purporting to repeal the act of June 29th, is void.

1. It is void, because a grant of land, or of a franchise, once made by a legislative body, cannot be rescinded by the granting power.

The law upon the subject is thus laid down by Justice Story: "*The Legislature cannot recall its grant, "nor destroy it. In this respect, the grant of a fran- "chise does not differ from a grant of lands. In each "case, the particular franchise, or particular land, is "withdrawn from the legislative operation. The sub- "ject matter has passed from the hands of the Govern- "ment.*"

Charles River Bridge Case.

Mr. Chitty says: "It is a principle of law, that the "king is bound by his own and his ancestors' grant, "and, therefore, cannot by his mere prerogative take "away vested rights, immunities and privileges."

Chitty Prerog., p. 132, *ch.* 8.

Chancellor Kent, speaking of grants of franchises, says: "They contain an implied covenant on the part "of the Government not to invade the rights vested, "and on the part of the grantees to execute the con- "ditions and duties prescribed in the grant."

3 *Kent's Com.*, 458.

See also

Fletcher v. *Peck*, 6 *Cranch*, 87.
Charles River Bridge Case, 7 *Pick*, 507.
Chitty on Prerog., ch. 16, § 5.
King v. *Amery*, 2 *T. R.*, 515.

2. The above general rule applies with great reason where the grant is founded upon a valuable and adequate consideration.

And that is the case here.

The consideration reserved in the grant is:

First. The right to have all the property and troops of the United States transported over the railroad free of all toll and charge forever.

Case, p. 15, § 3.

Second. The right to have the mails carried upon the road at such price as shall be fixed by Congress, or the Postmaster General.

Ib., p. 15, § 5.

Third. The enhanced value of the even sections of government land, consequent upon the undertaking to build the road; the minimum price of such even sections being doubled by the act itself.

Ib., p. 14, § 2.

Fourth. The obligation on the part of the company to build the road; it now being the settled law, that the acceptance of a charter like this implies a covenant or creates an obligation to construct the road, which obligation may be enforced by *mandamus*, or other analogous proceeding.

Lyme Regis v. *Henley*, 5 *B. & Adol.*, 77; *S. C.*, 5 *Bing.*, 91.
Reg. v. *B. & P. Railway Co.*, 9 *Car. R.*, 478; *S. C.*, 6 *Jurist*, 804.
Charles River Bridge Case, 7 *Pick.*, 446, 7, 8.
Rex v. *Hastings*, 1 *D. & R.*, 148; *S. C.*, 5 *B. & A.*, 692, *n.*
Cohen v. *Wilkinson*, 12 *Beav.*, 125; *S. C.*, 13 *Jurist*, 621.

3. The Repealing Act attempts to deprive persons of their property without compensation or due process of law, and is, for that reason, a violation of the Constitution of the United States.

Amendments to Constitution, Art. 5.

(a.) If the act is to be construed as an attempt to take the property for public use, then it is void, because no provision is made therein for the payment of compensation to the owner.

Piscat. Bridge Case, 7 *N. H. Rep.*, 35.
Charles River Bridge Case, 7 *Pick.*, 507.
Gardiner v. *Newburgh*, 2 *John. Ch. R.*, 168.
Perry v. *Wilson*, 7 *Mass. R.*, 395.
Stevens v. *Mid. Canal Co.*, 12 *Id.*, 468.
Callendar v. *Marsh*, 1 *Pick. R.*, 430.
Van Horne's Lessee v. *Dorrance*, 3 *Dall.*, 304.
Livingston v. *Mayor of N. Y.*, 8 *Wend.*, 85.

(b.) Or, if it shall be held that the intention of the act is not to take the property for public use, but simply to divest the owner of his interest, such act is void, because it is an attempt to do that by a legislative proceeding which the Constitution declares

shall only be done by due process of law; that is, by a judicial proceeding, according to the course and practice of courts of justice.

Wilkinson v. *Leland*, 2 *Peters*, 657.
Taylor v. *Porter*, 4 *Hill R.*, 140.
2 *Kent's Com.*, 13.
Hoke v. *Henderson*, 4 *Dev. N. C. Rep.*, 15.
Co. Litt., 2 *Inst.*, 45, 50.
Jones v. *Perry*, 10 *Yerger*, 59.

4. The Repealing Act is void, because it is contrary to the principles of justice and equity.

A law of parliament, even, is adjudged void by the courts when against common right and reason.

Bonham's Case, 8 *Co.*, 118.
Day v. *Savage*, *Hobart's R.*, 87.
City of London v. *Wood*, 12 *Mod.*, 687.

See also

Bowman v. *Middleton*, 1 *Bay.*, 252.
1 *Kent's Com.*, 451; *Ib.*, 448.
Smith's Com. on Const., § 158.
Bates v. *Kimball*, 2 *Chip. R.*, 89.
Merrill v. *Sherburne*, 1 *N. H. R.*, 213.
Wilkinson v. *Leland*, 2 *Peters*, 627.

V.

For the foregoing reasons, the defendant had a perfect right, as against the United States, to survey and locate their railroad upon the lands of the government along the route described in the granting acts, and to construct such railroad thereon.

And the plaintiff in this action has no greater or other rights than the United States, from whom he derived his alleged title, after the line of the road was surveyed, and the track located, and in the possession of the defendants.

(1.) The railroad was located on the 20th of October, 1855.

Case, p. 21.

No purchase was made by the plaintiff until after the first of January, 1856.

Case, p. 21.

2. The plaintiff took nothing by his purchase and entry.

(a.) The grantor, the United States, then, had no title.

(b.) The officers of the land office had no power to sell.

The land had been appropriated by the act of June 29th for a specific purpose, and had been specifically designated and set apart by the act of location. It was, therefore, taken from the operation of the general laws authorizing sales by registers and receivers.

In *Wilcox* v. *Jackson*, (13 *Peters*, 498, 513,) the Court says: "Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated *becomes severed from the mass of the public lands;* and no subsequent law, or proclamation, or sale, would be construed to embrace it."

See, also, *Patterson* v. *Wynn*, 11 *Wheat.*, 380.
Polk's Lessee v. *Wendell*, 9 *Cranch*, 87.
Lessieur v. *Price*, 12 *How.* 59.

The decision of this Court in the case of *Rutherford* v. *Greene*, (2 *Wheat.*, 196,) covers this point, as well as nearly every other point in the case.

In that case, the legislature of North Carolina, in 1782, passed an act, declaring that 25,000 acres of land *shall be* allotted for, and given to, General Greene, to be laid off by certain commissioners,

designated in the act. Under a subsequent act, passed in 1783, a portion of the lands in this grant were entered and purchased by the plaintiff.

In delivering the opinion of the Court, *C. J. Marshall* said: "It is contended that these words (shall be allotted and given, &c.,) give nothing; that they are in the *future* and not the *present* tense. The Court thinks differently. The words are words of absolute donation; not indeed of any specific land, but of 25,000 acres in the territory set apart," &c.

"It is clearly and unanimously the opinion of this Court that the act of 1782 *vested* a title in General Greene to 25,000 acres of land to be laid off within the bounds alloted to the officers and soldiers, and that the survey made in pursuance of that act gave precision to that title, and attached it to the land surveyed; that his rights are not impaired by the acts of 1783, and the entry of the appellant."

J. M. Barbour
Wm. Curtis Noyes
of Counsel for
Plaintiff in Error.